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In The

Supreme Court of the United States

October Term, 1992

JAMES R. CRUCE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

IMPOSITION OF SENTENCE PURSUANT TO MORE PUNITIVE GUIDELINE AMENDMENTS ADOPTED AFTER THE DEFENDANT'S OFFENSES HAD BEEN COMMITTED VIOLATE THE EX POST FACTO CLAUSE.

II.

THE COURT ERRED IN ACCEPTING DEFENDANT CRUCE'S PLEA TO THE CONSPIRACY COUNT AND ERRED IN ITS REFUSAL TO PERMIT DEFENDANT CRUCE TO WITHDRAW HIS PLEA TO THAT COUNT AS A SUFFICIENT FACTUAL BASIS WAS NOT MADE TO SUPPORT THE PLEA AS CONSTRUED BY THE COURT IN VIOLATION OF RULE 11, F.R.Cr.P., AND THE DUE PROCESS CLAUSE.

III.

THE COURT ERRED IN FAILING TO SET ASIDE THE SENTENCE IMPOSED AND GRANT RECUSAL WHEN IT WAS DISCLOSED THAT THE SENTENCING COURT RECEIVED AND CONSIDERED PREJUDICIAL EX PARTE COMMUNICATIONS FROM THE F.D.I.C. AND R.T.C. PRIOR TO SENTENCE, AND THE REMAND FOR RESENTENCING ORDERED BY THE TENTH CIRCUIT COURT OF APPEALS SHOULD BE HEARD BY A DIFFERENT DISTRICT JUDGE.

PARTIES TO THE PROCEEDING

Parties to the proceeding are the United States of America, petitioner James R. Cruce, and his codefendant, Thomas A. Burger. It is the understanding of counsel that Thomas A. Burger, codefendant, will be filing a Petition for a Writ of Certiorari in the near future.

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

The petitioner, James R. Cruce, respectfully requests that this Court issue its Writ of Certiorari to review the Order and Judgment of the United States Court of Appeals for the Tenth Circuit entered by it in this proceeding on June 11, 1992.

OPINIONS BELOW

The Order and Judgment of the United States Court of Appeals for the Tenth Circuit is not reported, pursuant

to Tenth Circuit Rule 36.3. A copy of that Order and Judgment appears in the Appendix.

By Order dated July 21, 1992, the Tenth Circuit denied James R. Cruce's Motion for Rehearing.

JURISDICTION

Petitioner Cruce entered a plea of guilty to four counts of an indictment alleging violations of 18 U.S.C. Secs. 371 and 1344 before the United States District Court for the District of Kansas, Senior United States District Judge Dale E. Saffels. Defendant Cruce was sentenced, *inter alia*, to a term of 168 months (14 years) imprisonment and ordered to immediately pay eight million dollars restitution. A timely notice of appeal was filed to the United States Court of Appeals for the Tenth Circuit. By its Order and Judgment entered June 11, 1992, the Tenth Circuit affirmed Cruce's conviction and sentence, with the exception that the case was remanded to the district court for resentencing to permit defendant Cruce to comment upon *ex parte* letters from the Chairman of the FDIC and counsel for the Resolution Trust Corporation considered by the Court but not disclosed to defendant Cruce prior to sentencing. With that exception, the Court of Appeals affirmed Cruce's conviction and the calculation and imposition of his sentence under the Guidelines.

A timely petition for rehearing was denied by the Tenth Circuit on July 21, 1992. In compliance with Rules 13.1, 13.4, 29.2 and 30.1, U.S. Supreme Court Rules, this Petition for a Writ of Certiorari was filed in this Court within ninety days of the date on which the United States

Court of Appeals for the Tenth Circuit denied petitioner Cruce's petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254(1) and Rule 13.1, U.S.Sup.Ct.R.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. *United States Constitution,* Article 1, Section 9, Clause 3.

   Bills of Attainder and Ex Post Facto Laws.

   "No Bill of Attainder or ex post facto Law shall be passed."

2. *Amendment V to the United States Constitution:*

   "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

3. *Rule 11(f), F.R.Cr.P.*

   "(f) Determining Accuracy of Plea.

   Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as

shall satisfy it that there is a factual basis for the plea."

STATEMENT OF THE CASE

James R. Cruce pled guilty to one count of conspiracy and three counts of bank fraud in the United States District Court for the District of Kansas. The district court at the time of sentencing refused to advise the defendant and his counsel of its factual findings on disputed sentencing issues prior to imposition of sentence and imposed a sentence using Guideline amendments whose effective date post-dated his offense and which quadrupled his sentence.

The district court also received and considered *ex parte* communications from the Chairman of the FDIC and counsel for the Resolution Trust Corporation which were prejudicial to defendant Cruce. He was sentenced to 168 months' custody and ordered to immediately pay eight million dollars' restitution. Cruce appealed to the Tenth Circuit which affirmed the conviction and the district court's method of arriving at the sentence, but remanded to the district court to permit Cruce to "comment" on the *ex parte* communications prior to reimposition of sentence. The Tenth Circuit refused to direct that the sentence be imposed by a different district judge.

On January 10, 1991, defendant/appellant James R. Cruce and six other defendants were indicted by the United States Grand Jury for the District of Kansas. The indictment charged in Count 1 conspiracy to violate the laws of the United States, 18 U.S.C. Section 371, that is, to

commit fraud against a federally-insured institution in violation of 18 U.S.C. Section 1344 and to make false statements to an agency of the United States in violation of 18 U.S.C. Section 1001. Counts 2 through 24 alleged substantive violations of the Bank Fraud Statute and Count 25 of the indictment alleged a substantive violation of the Fraudulent Statement Statute. All defendants were charged in all counts.

The indictment alleged that defendants Cruce and Thomas D. Dunn, Jr. were the owners, through a holding company, of Peoples Heritage Federal Savings and Loan Association of Salina, Kansas (hereinafter "Peoples"). Cruce was the president of Peoples and Dunn was the chairman of the board. Also serving on the board was Thomas A. Burger, who was also the chief lending officer.

The indictment, in paragraph 17, alleged:

> "17. Commencing at least as early as 1984, the exact date being unknown to the grand jury, and continuing until the return of this indictment . . . "

that the defendants conspired to defraud the United States by execution of a scheme to defraud Peoples, a federally-insured financial institution, and to make false statements to an agency of the United States.

The object of the conspiracy was alleged in paragraph 18 to be:

> "18. The object of the conspiracy was to illegally obtain money, which had been entrusted to the custody and control of Peoples, in the form of savings deposits and other credits and securities given over

> to the safekeeping of defendants JAMES R. CRUCE, THOMAS D. DUNN, JR., and THOMAS A. BURGER and the other management of Peoples, and to use the money for the personal enrichment of the defendants, who used the money to purchase real estate in Texas, for speculation, development and/or resale, to purchase stock in AmeriWest Financial Corporation and to meet obligations of various investment efforts."

In paragraph 19 of the indictment, the manner and means of the conspiracy alleged that defendants Cruce, Dunn and Burger formed joint ventures with major borrowers of Peoples, exploiting their positions at Peoples by approving loans to the joint ventures in which they had an interest.

The indictment alleged that the financial interests of Burger, Cruce and Dunn were concealed in the joint ventures from the board and management of Peoples and regulatory personnel.

Finally, the conspiracy count alleged that the defendants committed overt acts which included the substantive offenses alleged in Counts 2 through 25, which were incorporated by reference. The conspiracy charge did not allege any overt act other than the substantive offenses charged in the indictment.

The substantive offenses and thus all overt acts were alleged to have occurred between April 26, 1985 (paragraph 48) and November 21, 1988 (paragraph 152). No date or action is referenced in the indictment subsequent to November 21, 1988.

On April 17, 1991, defendant Cruce with his then counsel, Mark Bennett, Jr., appeared before the District Court and announced that a plea agreement had been agreed to with the Government, providing, *inter alia*, that defendant Cruce would plead guilty to Counts 1, 18, 19 and 20. In return for those pleas, the Government agreed to dismiss all remaining counts of the indictment, dismiss all counts of a companion indictment, bring no additional charges in the district against Cruce concerning his ownership or transactions with Peoples, request that any sentence which might be imposed arising from his activities at Peoples in any other jurisdiction be run concurrent with the sentence imposed in this case. The plea agreement also provided that the Government would " . . . not advocate a specific sentence, fine or imprisonment."

As is the practice in the District of Kansas, defendant Cruce and his counsel executed and filed a Petition to Enter Plea of Guilty with the District Court. As the required statement of factual basis, Cruce, in his Petition to Enter Plea of Guilty, stated in answer to Question 5:

> "During the time period from 1984 through 1987, I entered into an agreement with other individuals, including Christopher Hashioka and James Bosler, whereby we set up an arrangement to purchase AmeriWest stock as it became available in large blocks on the open market in an attempt to keep the price of that stock up. At the time we entered into the agreement, I owned many thousands of shares of the stock and since the stock price was going down it was to my benefit if I could keep the price from going down further. The agreement that we entered into involved the loaning of

> $5,000,000 to James L. Bosler by Peoples Heritage Savings and Loan and then Mr. Bosler was to loan the money to third parties so that they could acquire the stock on the open market and keep the price up."

During the plea proceeding, the District Court read the above quoted paragraph, paraphrasing it slightly, and asked Cruce whether he understood it and if he did that. Cruce, while under oath, answered yes to both questions. The Court then inquired of Government counsel concerning evidence which he could adduce to prove the defendant guilty. Counsel thereafter made a detailed statement of the facts of the offenses, referring to activities in November, 1987, December, 1987, and July, 1988.

Defendant Cruce then acknowledged that he believed the Government had evidence to prove him guilty of the four counts to which he had tendered a plea of guilty.

The District Court then advised defendant Cruce that on November 1, 1987, a new sentencing law went into effect in the United States.

The District Court explained features of the Sentencing Guidelines to defendant Cruce in some detail, advising him that parole was abolished; that all conduct would be taken into account even though he pled guilty to less than all counts; that lies to the probation officer, commission of an offense while on probation, commission of an offense within two years after release from prison, receipt of a substantial portion of his income from criminal conduct, crimes of violence, and drug trafficking offenses could all increase his sentence; and that probation was not available as an option for most offenses. Cruce was

also advised that if he provided substantial assistance, the Court could impose a sentence below the recommended Guideline range.

Cruce was never advised that the 1989 and 1990 amendments to the Guidelines might apply. He had the right to withdraw his plea to Count 1 if the maximum sentence on that count was determined to be more than five years.

A presentence investigation was ordered, the Court accepted Cruce's plea of guilty to Counts 1, 18, 19 and 20, and he was adjudged guilty of those offenses.

The probation office prepared an initial presentence report which calculated defendant Cruce's total offense level at 34, or a Guideline sentencing range of 151 months to 188 months. In making that calculation, the probation office applied amendments to the 1987 Guidelines that became effective on November 1, 1989 and November 1, 1990.

The presentence report recommended that the grouped base level of 6 U.S.S.G. Section 2F1.1(a), be enhanced 18 levels because of losses in excess of eighty million dollars. The effective date of that amendment was November 1, 1989. Prior to that date the maximum amount on the loss table under Section 2F1.1(b)(1)(1) was, over five million dollars, add 11 levels. Thus, by application of the Guideline amendment effective November 1, 1989, 7 Levels were added to defendant Cruce's base level.

The presentence report, paragraph 111, also recommended the assessment of a 4-level upward adjustment

pursuant to Section 2F1.1(b)(6) for an offense which substantially jeopardized the safety and soundness of a financial institution. That subdivision was added to the Guidelines by the November 1, 1990 amendments and added a 4-level increase to defendant's base offense level. Prior to November 1, 1990, such an adjustment had not been in existence.

The presentence report also proposed that an increase of 2 levels be assessed pursuant to Section 3B1.3 for abuse of a position of trust of special skill. The 1987 Guidelines provided that the 3B1.3 upward adjustment could not be employed in addition to the upward adjustment provided for in Section 3B1.3 for an organizer or leader of criminal activity. As the presentence report proposed a 4-level upward adjustment pursuant to Section 3B1.1, under the Guidelines in effect on November 1, 1987, the additional 2-level upward adjustment proposed in the presentence report could not have been assessed.

The effect therefore of the 1989 and 1990 amendments caused an increase in the defendant's offense level from level 21 (37 to 46 months) to level 34 (151 to 188 months), or more than four times.

The initial draft of the presentence report was prepared and dated June 19, 1991.

On July 10, 1991, counsel for defendant Cruce delivered written objections to the initial draft of the presentence report. This letter articulated the defendant's objections to application of the 1989 and 1990 Guideline amendments.

Counsel for defendant Cruce, recognizing the devastating effect on the sentence proposed to be imposed, filed a conditional or alternative motion to withdraw his plea of guilty to Count 1 (the conspiracy count) or to have the Court determine that the November 1, 1989 and November 1, 1990 Guideline amendments did not apply and that the sentence should be governed by the Guidelines in effect on November 1, 1987.

On July 31, 1991, the District Court entered its Memorandum and Order finding that the conspiracy continued in existence beyond the effective dates of the amended Guidelines and that defendant Cruce had not shown that he withdrew from the conspiracy in 1988 and directed that the Guidelines as amended in November, 1989 and November, 1990 would be applicable to defendant Cruce. The Court also denied defendant Cruce's motion to withdraw his plea of guilty as to Count 1 of the indictment.

The letter of counsel for defendant Cruce to the probation officer detailed objections and suggested clarifications to 62 of the 220 numbered paragraphs of the initial draft of the presentence report. By those objections Cruce denied many of the factual allegations of the report, particularly those relating to counts of the indictment to which he did not plead guilty, the charges contained in the companion indictment which was to be dismissed, and the claimed losses for unindicted acts. Cruce specifically objected to the report's conclusion concerning the claimed total loss due to Cruce's involvement and the losses to taxpayers from Peoples Heritage as a whole.

By letter dated July 24, 1991, the Government replied to defendant Cruce's objections.

Thereafter, the probation office prepared a revised presentence report which included some modifications suggested by defense counsel and the Government and then summarized each of the defendant's objections, summarized the Government's response to that objection, stated the probation officer's response to each objection, and provided blank space for a written court finding concerning that objection.

The court's specific findings concerning the defendant's objections to the facts stated in the presentence report were not stated, entered or made known to the defendant or his counsel at the time of sentencing. The court refused to make findings on the " . . . disagreed facts. . . . " The court stated:

> " . . . [I]t takes more time than I want to give to read our findings. I have it prepared and they will be endorsed on the addendum and you will be supplied with a copy of our findings but I didn't have in mind to read them into the record at this time."

The court imposed a sentence including aggregated confinement of 168 months which included consecutive sentences on Counts 18 and 19 and restitution in the amount of eight million dollars through the Clerk of the Court to the Resolution Trust Corporation. Restitution was directed to be paid immediately and the court ordered:

> " . . . the victim may assume responsibility for collection of any balance of the restitution not paid pursuant to 18 U.S.C. Section 3663(h)(2).

> Nine, no credit for any amount recovered under the Order may be made toward the restitution obligation of any other defendant."

Thereafter, four days later, on August 5, the judgment was entered.

Thereafter, on August 12, 1991, defendant Cruce filed his Motion for Reconsideration and to Vacate Sentence and for Resentencing, together with his Motion to Disqualify and Recuse.

By his Motion to Disqualify and Recuse, defendant Cruce suggested that the district court had demonstrated a personal bias or prejudice against him by not making known to him or his counsel *ex parte* communications by representatives of the United States prior to defendant's sentencing and thereby denying him the right to dispute or respond to the accusations contained in the *ex parte* communication.

Defendant Cruce's Motion for Reconsideration and Resentencing requested that the court reconsider its denial of his previously filed Motion to Withdraw Plea as to Count I, to reconsider its denial of his Motion for Imposition of Sentence Pursuant to the 1987 Guidelines, and to vacate and set aside the August 1, 1991 sentence and for resentencing. That motion, as well as the motion to recuse, was based upon the discovery that on July 16, 1991, Jack D. Smith, deputy general counsel for the Federal Deposit Insurance Corporation in charge of criminal restitution, had written a 15-page letter to the sentencing judge, detailing its position with regard to sentencing of defendant Cruce and his codefendants.

It was also discovered that former FDIC Chairman L. William Seidman had, before his resignation, also written to Judge Saffels urging a substantial term of imprisonment and meaningful restitution. Chairman Seidman's letter referred to the Jack Smith letter as " . . . our victim's statement. . . . "

The Jack Smith letter contains factual statements, arguments and conclusions relating to both the offenses to which Cruce pled guilty, charges which were dismissed under the plea agreement and unindicted criminal acts. The Smith letter contained numerous citations, statutory references, statements of legislative history, footnotes and was self-described on p. 5 as a " . . . legal memorandum. . . . " The memorandum accused Cruce of assignation with prostitutes provided by a codefendant, Las Vegas money laundering utilizing paper bags, unaccounted for millions in profits, lack of cooperation, refusal to comply with subpoenas and factual attributions to "sources".

Neither the Smith legal memorandum nor the Seidman letter was disclosed to Cruce's counsel prior to sentencing.

On August 22, 1991, the district court entered its Memorandum and Order denying the motions of defendant Cruce and similar motions of his codefendant Thomas A. Burger.

The court denied an evidentiary hearing concerning its receipt and consideration of the letters.

Cruce appealed to the United States Court of Appeals for the Tenth Circuit who generally affirmed the proceedings in the district court but remanded the matter for resentencing to permit Cruce to "comment upon [the letters in question] and the probation officer's determination and other matters relating to the appropriate sentence." The district court, in denying Cruce's motion for reconsideration and resentencing, stated that the letters were not used in imposing sentence, but the Tenth Circuit Court of Appeals in its opinion in the appeal of codefendant Burger held concerning the letters:

> "We do so mindful that although the Court stated it did not rely on the letters, its order of restitution would indicate otherwise."

The Tenth Circuit refused to direct that the resentencing be conducted by a different district judge.

ARGUMENT

I.

IMPOSITION OF SENTENCE PURSUANT TO MORE PUNITIVE GUIDELINE AMENDMENTS ADOPTED AFTER THE DEFENDANT'S OFFENSES HAD BEEN COMMITTED VIOLATE THE EX POST FACTO CLAUSE.

The opinion of the Court of Appeals, by approving the district court's determination that the 1989 and 1990 amendments to the Sentencing Guidelines applied to the defendant's case, effectively quadrupled his sentence. Application of Guideline amendments which were not in effect on the date of the offense and which prejudice the

defendant violate the *ex post facto* clause of the United States Constitution. *Miller v. Florida*, 482 U.S. 423 (1987); *United States v. Underwood*, 938 F. 2d 1086, 1090 (10th Cir. 1991)

The Court of Appeals acknowledged this rule but found that Count I of the indictment (the conspiracy charge) occurred or continued beyond the effective dates of the 1989 and 1990 amendments.

The indictment does, in fact, allege that the conspiracy commenced " . . . at least as early as 1984, the exact date being unknown to the grand jury, and continuing until the return of this indictment. . . . " The indictment was in fact returned on January 10, 1991.

When defendant entered his plea of guilty he and his counsel were very specific in stating to the court that his plea was to conduct from 1984 through 1987. The defendant's position was made crystal clear by his answer to paragraph 5 of the district court's petition to enter plea of guilty wherein in making his factual basis for his plea he stated in part:

> "During the time period from 1984 through 1987 I entered into an agreement with other individuals. . . . "

Counts 18, 19 and 20 of the indictment are alleged to have occurred on or about December 14, 1987, December 17, 1987 and January through July, 1988 and thus by their specific allegations were committed prior to the effective dates of the 1989 and 1990 Guidelines. Therefore, the only arguable justification for application of the 1989 and 1990 amendments is the boiler plate allegation in Count 1 (the conspiracy count) which suggests that the conspiracy

continued until the date of the return of the indictment–January 10, 1991.

The limited nature of defendant's plea was reiterated at the change of plea proceeding wherein the district court read the language quoted from paragraph 5 above to the defendant, including the years 1984 through 1987, and asked him, "Did you do that?"

The Government counsel was then asked to detail the evidence which it could produce to prove the defendant guilty. Government counsel did so. In its factual recitation the latest date referred to by the Government was July of 1988. The Government made no suggestion or statement that it had any evidence of conspiratorial criminal activity on the part of the defendant or any conspirator after the effective date of the 1989 and 1990 Guidelines.

Neither the district court nor counsel for the Government made any objection to or statement concerning the dates referred to in the factual basis for defendant's plea. The district court did not, during the plea proceeding, make any reference to any other ending date for the conspiracy other than through 1987.

The district court, in advising the defendant concerning the effect of the Sentencing Guidelines, made reference to their effective date as November 1, 1987. The district court did not make any reference to the 1989 and 1990 Guideline amendments which it devastatingly applied to the defendant.

In the face of the defendant's date-specific plea, and the court's acceptance of that plea, the district court erred

in finding that the defendant was bound by the allegations contained in the indictment and erred in finding that the conspiracy continued to the date of its return.

The court and the parties are not bound by the bare allegations of the indictment but must look to the evidence to determine when the offense actually occurred in order to determine the application of the Guidelines or amendments.

In determining whether or not the Guidelines or amendments to them apply to a defendant's sentence, the Court must look to the evidence to determine the date of the offense is not bound by the specific dates alleged in the indictment, but must make that determination by considering the facts developed at allocution or trial. *United States v. Story*, 891 F.2d 988 (2d Cir. 1989); *United States v. Bakker*, 925 F.2d 728 (4th Cir. 1991); and *United States v. Bloom*, 945 F.2d 14 (2nd Cir. 1991).

The decision of the Court of Appeals is squarely in conflict with the cited decisions of the Second and Fourth Circuits and establishes a violation of the *ex post facto* clause. Cruce's plea, which was accepted by the district court, was limited to the time period from 1984 through 1987 and the more punitive Guidelines adopted in 1989 and 1990 cannot be constitutionally applied to him.

Cruce entered a very date specific plea to the conspiracy alleged. It is axiomatic that to be guilty of a conspiracy the defendant need not admit participation in all acts of the conspiracy nor need he admit participation throughout the full time alleged in the indictment. The decision of the Court of Appeals ignores this Court's

holding in *Miller v. Florida*, 482 U.S. 423 (1987), and violates the *ex post facto* clause of the Constitution.

II.

THE COURT ERRED IN ACCEPTING DEFENDANT CRUCE'S PLEA TO THE CONSPIRACY COUNT AND ERRED IN ITS REFUSAL TO PERMIT DEFENDANT CRUCE TO WITHDRAW HIS PLEA TO THAT COUNT AS A SUFFICIENT FACTUAL BASIS WAS NOT MADE TO SUPPORT THE PLEA AS CONSTRUED BY THE COURT IN VIOLATION OF RULE 11, F.R.Cr.P., AND THE DUE PROCESS CLAUSE.

The district court erred in accepting defendant Cruce's plea of guilty to Count 1 of the indictment wherein he specified that his participation in the conspiracy continued only " . . . through 1987. . . . " The limited nature of the defendant's plea was made clear to the district court in the defendant's petition to enter a plea of guilty and then repeated by the district court in its examination of the defendant under oath during the plea proceeding.

The district court, at the conclusion of the proceeding, accepted the plea agreement and found the defendant guilty. The district court did not require that the defendant admit guilt to a conspiracy continuing until the return of the indictment on January 10, 1991, as alleged in the indictment. The district court and the parties were thus either bound by the limited nature of the defendant's plea to the conspiracy count (*United States v. Bloom*, 945 F.2d 14 (2nd Cir. 1991)) or the court was required to permit the defendant to withdraw his plea of guilty to Count I when it became apparent that the district court

intended to sentence the defendant based upon the boiler plate language in the indictment alleging that the conspiracy continued to the date of its return.

The Government and the district court cannot simply have it both ways, that is, accepting a defendant's plea limited to a specified timeframe and then obtaining a quadruple sentence based on amendments effective outside the specified timeframe, thus sandbagging the defendant concerning the extent and consequences of his plea and the maximum penalties which could be imposed.

When defendant's counsel was first advised of the court's intention to impose sentence on a conspiracy extending into 1991 to which the defendant had not plead guilty, counsel prior to imposition of sentence filed a motion to withdraw the plea.

Withdrawal of a plea prior to sentence should be liberally allowed and treated with broad standards of liberality if the defendant presents a fair and just reason. *Barker v. United States*, 579 F.2d 1219 (10th Cir. 1978); *United States v. Rhodes*, 913 F.2d 839 (10th Cir. 1990), *cert. denied*, 111 Sup.Ct. 1079.

A defendant who pled guilty to one version of an offense but is being sentenced for another version of the offense certainly presents a fair and just reason for withdrawal. Either the factual basis for the plea was not properly made under Rule 11, F.R.Cr.P., or the defendant should be permitted to withdraw it under Rule 32(d) if the district court is to be permitted to sentence under the literal language of the indictment, using the later adopted amendments.

The district court's construction of Cruce's plea to cover the full time period alleged in the indictment instead of the limited time period specifically stated in his petition to plead guilty and in the sworn plea proceedings resulted in a quadrupling of his sentence. If the district court intended to hold him to a plea to the full time period alleged in the indictment it should have required him to make a factual admission of guilt encompassing that time period. The district court, however, permitted him to plead guilty to conspiratorial activity for less than the full time period stated in the indictment. Such a limited plea is certainly appropriate in a conspiracy case which does not require that a defendant participate in all conspiratorial acts or participate for the full time alleged in the indictment to be guilty of conspiracy. If the district court was not willing to be bound by the limited time period which the defendant stated, it should not have accepted his plea or should have granted his motion to withdraw.

Surely the district court's expansive construction of the defendant's plea of guilty to the conspiracy charge which far exceeded the defendant's stated plea and factual basis should constitute a fair and just reason for withdrawal of the plea which was requested prior to sentence under Criminal Rule 32(d).

The opinion of the Court of Appeals countenances and approves a clear violation of Rules 11 and 32 and defendant's right to due process.

III.

THE COURT ERRED IN FAILING TO SET ASIDE THE SENTENCE IMPOSED AND GRANT RECUSAL WHEN IT WAS DISCLOSED THAT THE SENTENCING COURT RECEIVED AND CONSIDERED PREJUDICIAL EX PARTE COMMUNICATIONS FROM THE F.D.I.C. AND R.T.C. PRIOR TO SENTENCE, AND THE REMAND FOR RESENTENCING ORDERED BY THE TENTH CIRCUIT COURT OF APPEALS SHOULD BE HEARD BY A DIFFERENT DISTRICT JUDGE.

Subsequent to imposition of the sentence, defendant Cruce and his codefendant, Thomas A. Burger, learned through newspaper stories that the Chairman of the FDIC and the Deputy General Counsel in Charge of Criminal Restitution for the Resolution Trust Corporation had written letters to the sentencing court which were not disclosed to defendant's counsel prior to sentencing.

On that discovery, counsel for both defendants filed motions to recuse the sentencing court, to vacate the sentence imposed and for reconsideration. The district court denied those motions.

The RTC letter was signed by the Deputy General Counsel of the RTC for criminal restitution. It also listed the name of the General Counsel for the FDIC, counsel for the RTC and two Texas lawyers and their firm were shown as of counsel. The letter itself, on p. 5, describes the document as a legal memorandum. With numerous case citations, statutory quotations, discussion of legislative history and footnotes, the document is a precisely constructed factual memorandum and legal brief directed to convincing the court to accept the Government's view

of the facts, the law and produce the agency's desired outcome.

The 1-page letter from L. William Seidman, Chairman of the FDIC, is an obvious attempt to use the power and influence of his position to prejudice the court against the defendant. It is clearly an example of the historically condemned practice of the King's knave whispering in the Chancellor's ear. The influence of the Smith and Seidman letters is obvious. The district court imposed restitution against both defendants Cruce and Burger in the precise terms and conditions requested by the agency. Those terms and conditions and the amount of restitution were not specified or suggested in the section of the presentence report with regard to restitution. The district court should thus have recused itself from further proceedings. *United States v. Wolfson*, 634 F.2d 1217 (9th Cir. 1980); *United States v. Furst*, 886 F.2d 558 (3rd Cir. 1989).

The court's receipt of the letters and their disclosure in the news media presents a clear case where the court's impartiality may be reasonably questioned and transfer to another judge is required. 28 U.S.C. Section 455; *Webbe v. McGhie Land Title Co.*, 549 F.2d 1358 (10th Cir. 1977).

The fact that the district court here imposed the substantial sentences requested and the exact amounts of restitution demanded are particularly telling. The further fact that the letters were disclosed to the media by the agency who sent them to the judge suggests that the agency desired that the public be aware that it could in fact influence the district court and have its way in such a case. The crowing cries of the agency certainly provides the element of appearance of lack of impartiality.

The substance of the *ex parte* communications dealt directly with issues disputed in the sentencing process and which the court refused to resolve as required by Rule 32, F.R.Cr.P. Recusal is required. *United States v. Sciuto*, 531 F.2d 842 (7th Cir. 1976); *Price Bros. Co. v. Philadelphia Gear Corp.*, 629 F.2d 444 (6th Cir. 1980).

When the district court received the letters, it had a duty to disclose them to counsel for the defendants but it failed to do so. This failure of the district court to take that corrective action aggravated the situation and further justifies recusal. *Cortese v. United States*, 782 F.2d 845, 852 (9th Cir. 1986).

The decision of the Court of Appeals remands the case for resentencing after providing the defendant with an opportunity to "comment" on the *ex parte* letters. That decision by the Court of Appeals is in conflict with and ignores cases holding that recusal is required at resentencing where the judge received and relied upon *ex parte* communications addressed to the court. *United States v. Wolfson*, 634 F.2d 1217 (9th Cir. 1980); *United States v. Rosener*, 485 F.2d 1213, 1229-31 (2d Cir. 1973); *Haller v. Robbins*, 409 F.2d 857 (1st Cir. 1969); *United States v. Furst*, 886 F.2d 558 (3rd Cir. 1989); *cert. denied*, 110 S.Ct. 878 (1990). Those decisions by the Second Circuit, Third Circuit and Ninth Circuit clearly require that a different judge should preside at the resentencing.

CONCLUSION

For the reasons and based upon the authorities set forth above, petitioner respectfully requests that this

Court issue its Writ of Certiorari to review the judgment entered by the United States Court of Appeals for the Tenth Circuit

Respectfully submitted,

/s/ Bruce C. Houdek
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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	No. 91-3274
	)	(Dist. of Kansas)
v.	)	(D.C. No. 91-40002-03)
JAMES R. CRUCE,	)	
Defendant-Appellant.	)	

ORDER AND JUDGMENT*
(Filed June 11, 1992)

Before **McKAY and BARRETT,** Circuit Judges, and **BRIMMER***, District Judge.

James R. Cruce appeals following a guilty plea and sentence to four counts charging conspiracy and bank fraud in violation of 18 U.S.C. §§ 371, 1344 and 2, and

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*This Order and Judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3

*The Honorable Clarence A. Brimmer, Chief Judge, United States District Court for the District of Wyoming, sitting by designation.

false statements to an agency of the United States in violation of 18 U.S.C. § 1001. This is a companion case to *United States v. Burger*, ___ F.2d ___, No. 91-3267, (10th Cir. 1992) filed May 21, 1992. The same district court judge presided in both cases.

Pursuant to Federal Rules of Appellate Procedure, Rule 28(i), Cruce has adopted by reference the appellate brief filed by codefendant Thomas A. Burger and the amicus brief filed by the National Association of Criminal Defense Lawyers.

On January 10, 1991, Cruce and six others, including Thomas A. Burger, were charged in a twenty-five count indictment with conspiracy and various bank fraud crimes leading to the failure of Peoples Heritage Savings and Loan of Salina, Kansas (Peoples), a federally chartered and insured savings and loan. Cruce, a certified public accountant, owned 50% of Peoples' parent, Peoples Federal Bank Shares, and served on Peoples' board and as its president at all times material herein.

Prior to trial, Cruce pled guilty to Count 1, conspiracy ("[c]ommencing at least as early as 1984, the exact date being unknown to the grand jury, and continuing until the return of this indictment"), and Counts 18, 19, and 20, substantive counts relating to the misuse of a five million dollar line of credit granted to one James L. Bosler. During his plea hearing, Cruce acknowledged that: he could be sentenced to five years imprisonment for each count; he could be ordered to pay restitution; the only reason he was entering a plea of guilty to the four counts was because he was in fact guilty of the offenses charged in the four counts; there was no limitation on the

information the court could consider at sentencing concerning his background, character, and conduct, provided that the information was reliable.

Cruce's presentence report related that: he would be sentenced in accordance with the Sentencing Reform Act of 1984 and amendments thereto (Appendix of Appellant, p. A 257); the "RTC [Resolution Trust Corporation] has totaled James Cruce with receiving direct benefit of $8 million through the complex schemes designed to defraud the institution and mislead federal regulators," *id.*, p. A 274; Cruce had prepared a financial statement reflecting a negative net worth of $22,253,777.00, *Id.*, p. A 295. The report set forth a sentencing range of 151 to 188 months.

After receiving the report, Cruce filed a conditional motion to withdraw his guilty plea and for a determination that the 1987 guidelines would govern his sentence rather than the 1989 and 1990 amendments thereto, and that restitution be limited to Counts 18, 19, and 20. In denying Cruce's motion, the court found that: Cruce, by pleading guilty to a conspiracy which commenced "at least as early as 1984 . . . and continu[ed] until the return of this indictment [January 10, 1991]," (Appendix of Appellant, p. A 005), had pled guilty to a crime which occurred subsequent to the effective dates of the November, 1989 and November, 1990 amendments to the guidelines; Cruce continued his participation and ownership in the joint ventures, corporations, partnerships and property, which was obtained with money illegally defrauded from Peoples, unimpeded until the issuance of the indictment; Cruce offered no evidence that he withdrew from the conspiracy in November, 1988; Cruce has not asserted

his innocence but, rather, is upset with the severity of the sentence which has been recommended in the presentence report; Cruce's motion to limit any restitution to Counts 18, 19, and 20 is inappropriate; 18 U.S.C. § 3664(d) allows the court to base its determination of restitution "on findings contained in the presentence report or other testimony or evidence supported by a preponderance of the evidence." (Appendix of Appellant, p. A 110).

Cruce was sentenced under the amended sentencing guidelines to fourteen years imprisonment and ordered to immediately pay eight million dollars in restitution to the RTC. Cruce subsequently moved for reconsideration and to vacate sentence and resentencing. Cruce also moved the district court to disqualify itself and recuse from further participation in the case. Cruce's motion for recusal was based on his allegation that the court had "demonstrated a personal bias or prejudice against him and in favor of the government by not making known to [him] or his counsel certain *ex parte* communications by representatives of the United States to the court prior to [his] sentencing on August 1, 1991." (Appendix of Appellant, p. A 211).

The court denied Cruce's motions. In so doing, the court found: no *ex parte* communication occurred between the court and the prosecution; the letters in question were from victims and not from the prosecution; the two letters in dispute were not used in determining Cruce's sentence; Cruce's sentence was based upon information in the presentence report, as amended and adopted by the court following two separate evidentiary hearings, and the "personal knowledge [the court] derived from presiding over the lengthy trial of," (Appendix of Appellant, p.

A 245), Cruce's alleged co-conspirators. The court also found that inasmuch as its prior denial of Cruce's motion to withdraw his guilty plea was proper that his motion for reconsideration would be denied.

On appeal, Cruce contends that the district court erred in: (1) applying the 1989 and 1990 guideline amendments; (2) finding there was an alternative justification for his fourteen year sentence under the 1987 guidelines; (3) imposing a fourteen year sentence without first resolving the disputed issues of fact; (4) imposing consecutive sentences on Counts 18, 19, and 20; (5) failing to grant a hearing, recuse, or reconsider his sentence upon disclosure of the *ex parte* communications to the court; and (6) accepting his plea of guilty to Count 1.

I.

Cruce contends that the district court erred in determining, in violation of the *ex post facto* clause, that the 1989 and 1990 amendments to the guidelines should apply to him when the offenses to which he pled guilty occurred prior to the effective date of those amendments. The government responds that the district court did not err in applying the 1989 and 1990 guideline amendments when, as here, Cruce pled guilty to a conspiracy that continued to January 10, 1991. We agree.

We rejected this same argument in *Burger*. Burger, like Cruce, pled guilty to a conspiracy "[c]ommencing at least as early as 1984, the exact date being unknown to the grand jury, continuing until the return of this indictment [January 10, 1991]." (Appendix of Appellant, p. A 005). In rejecting Burger's argument that his sentence

under the amended guidelines violated the *ex post facto* clause, we held:

> Inasmuch as Burger pled guilty to a conspiracy which extended over seven years and terminated after the implementation of the 1990 amendments, his sentence under the 1990 guidelines was not in violation of the ex post facto clause. See *United States v. Morrison*, 938 F.2d 168, 170 (10th Cir. 1991) ("the guidelines apply to "straddle" crimes: continuing offenses 'in which acts comprising the crime occur both before and after the effective date of the Guidelines.' *United States v. Bakker*, 925 F.2d 728, 739 (4th Cir. 1991))."

United States v. Burger, Sl. Op. at p. 18.

II.

Cruce argues that the court erred in finding that there was an alternative justification for the fourteen year sentence imposed under the 1989 and 1990 amendments by way of an upward departure from a sentence imposed under the 1987 guidelines. During Cruce's sentencing, the district court found "that should the original guidelines be applicable in this case, an upward departure for an aggregated sentence of 168 months is appropriate and justified." (Appendix of Appellant, p. A 180).

We rejected this same argument in *Burger*, holding, "[i]nasmuch as the district court properly sentenced Burger under the 1990 guidelines . . . we need not examine the propriety of the court's alternative sentence under the 1988 guidelines." *United States v. Burger*, Sl. Op. at p. 18.

III.

Cruce contends that the district court erred "in imposing the fourteen-year sentence as it failed to make factual findings resolving the disputed issues of fact prior to the imposition of sentence." (Brief of Appellant at p. 32). Cruce acknowledges that he was allowed to make extensive objections to the factual findings contained in the presentence report "after receipt of the initial draft of the presentence report," *id.* at p. 33, and that "[t]hese objections were again detailed at sentencing." *Id.* Nevertheless, Cruce argues that inasmuch as the district court did not "make factual findings resolving the disputed issues of fact prior to imposition of sentence," the district court violated Fed. R. Crim. P. 32 and his sentence must be set aside and his case remanded for hearing and sentencing. In making this argument, Cruce relies on *United States v. Alvarado*, 909 F.2d 1443 (10th Cir. 1990) for the proposition that the court's noncompliance with Rule 32 requires a remand.

We rejected this same argument in *Burger*, holding:

> We agree with Burger that Rule 32(c)(3)(D) and *United States v. Alvarado* . . . require the district court to reduce its findings regarding disputed materials to written form and attach them to the presentence report. The district court did so herein. We do not agree with Burger that Rule 32(c)(3)(D) "[a]ccordingly . . . expressly afforded the opportunity to review such findings prior to imposition of sentence."
>
> Neither Rule 32(c)(3)(D) nor *United States v. Alvarado* . . . require that a defendant be afforded the opportunity to review the court's

> findings prior to the imposition of sentence. The district court complies with Rule 32(c)(3)(D), when, "as to each matter controverted [it] make[s] a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing" and performs the "ministerial task of appending its determinations regarding disputed matters in the presentence report." *United States v. Jackson*, 950 F.2d [633] at 638 [10th Cir. 1991].

United States v. Burger, Sl. Op. at p. 16.

IV.

Cruce argues that the district court erred in imposing consecutive sentences on Counts 18, 19, and 20 as the offenses alleged in those counts constituted but one violation of the bank fraud statute. We considered and rejected this same argument in *Burger:*

> On appeal, Burger argues, as he argued to the district court, that the sentences on the non-conspiracy counts must be vacated because they constituted multiple sentences for the same crime. We disagree. We adopt the district court's findings:
>
> > The court further finds that defendants' arguments that the Indictment violates the double jeopardy clause, and thus, should be dismissed is without merit. The crimes charged in this Indictment involve bank fraud, [and] under the relevant statute, 18 U.S.C. § 1344, an offense occurs upon each execution or attempted execution of a scheme to defraud. *United States v. Poliak,*

> 823 F.2d 371, 372 (9th Cir. 1987), *cert. denied*, 485 U.S. 1029 (1988). Thus, each count of the Indictment involving a draw upon a line of credit would constitute a separate execution of the scheme and would be punishable as a separate crime. The court further notes that this argument is untimely because it was first raised in defendants' motions for reconsideration. Fed. R. Crim P. 12(f).

United States v. Burger, Sl. Op. at p. 17.

V.

Cruce contends that the district court erred in failing to grant a hearing, recuse itself, or reconsider the sentence imposed upon disclosure of the prejudicial *ex parte* communications to it prior to imposition of his sentence.

Cruce argues that subsequent to the imposition of his sentence, he learned through newspaper stories that Chairman Seidman of the Federal Deposit Insurance Coproration [sic] (FDIC) and the Deputy General Counsel in charge of criminal restitution for the FDIC and the RTC had written letters to the sentencing court which were not disclosed to his counsel prior to sentencing.

Chairman Seidman related in his letter that he was "concerned that the sentence imposed upon Mr. Cruce reflect the seriousness of his crime and serve to deter others from committing similar acts." (Appendix of Appellant at p. A 338). Chairman Seidman also stated that "[a]s a result of his [Cruce's] activities, Peoples suffered losses exceeding $149 million." *Id.*

The Deputy General Counsel related in his letter that the court should impose upon Cruce a substantial prison sentence and order restitution in an amount of not less than $8 million. (Appendix of Appellant at p. A 322). The Deputy General Counsel also related that Cruce received large cash kickbacks; part of the money paid to Cruce was laundered through a Las Vegas casino and returned to Cruce in a brown paper bag; one of Peoples' lenders provided Cruce and Burger with the use of an airplane, cars, and "limo" drivers who provided prostitutes; Cruce "assisted in the theft of millions of dollars from the institution [Peoples] the dissipation of hundreds of millions of dollars on bad loans." (Appendix of Appellant, p. A 335).

In denying Cruce's motions, the district court stated that the probation office had "promoted" the idea that Cruce pay eight million dollars in restitution, (Appendix of Appellant, p. A 241); the two letters in dispute were not used in determining Cruce's sentence, *id.*, p. 244; and Cruce's sentence was based upon information contained in the presentence report and the personal knowledge the court derived from presiding over the lengthy trial of Cruce's alleged co-conspirators.

We agree with Cruce that he "at least had a right to confront the allegations [in the letters] and challenge their accuracy." (Brief of Appellant, p. 40). In granting similar relief in *Burger*, we held:

> Under Rule 32, "it is clear that the defendant and the government enjoy equal procedural entitlements." *Burns v. United States*, ___ U.S. ___, 111 S. CT. 2182, 2185 n. 4 (1991). In holding that a defendant was entitled to notice

that a district court was contemplating departing upward from the guideline sentencing range based on a ground not previously identified for upward departure, the Court opined:

> As amended by the Sentencing Reform Act, Federal Rule of Criminal Procedure 32 provides for focused, adversarial development of the factual and legal issues relevant to determining the appropriate Guideline sentence. Rule 32 frames these issues by directing the probation officer to prepare a presentence report addressing all the matters germane to defendant's sentence . . . Rule 32(a)(1) provides that '[a]t the sentencing hearing, the court [must] afford the counsel for the defendant and the attorney for the Government an opportunity to comment upon the probation officer's determination and other matters relating to the appropriate sentence.'
>
> * * *
>
> . . . Rule 32 contemplates full adversary testing of the issues relevant to a Guidelines sentence and mandates that the parties be given 'an opportunity to comment upon the probation officer's determination. . . . '
>
> 111 S. Ct. at pp. 2185-6.

No less a standard should be applied to the letters from Chairman Seidman and the FDIC. We hold that Burger is entitled to a resentencing during the course of which he shall have the opportunity to "comment upon [the letters in question and] the probation officer's determination and other matters relating to the appropriate sentence."

United States v. Burger, Sl. Op. at pp. 14-15.

VI.

Cruce contends that the district court erred in accepting his plea of guilty to Count 1 and in denying his motion to withdraw his plea of guilty.

Cruce argues that the court erred in accepting his guilty plea to Count 1 because he specified that his participation in the conspiracy continued only through 1987. Contrary to Cruce's appellate contentions that his plea should be vacated because his participation in the conspiracy continued only through 1987, Cruce pled guilty to a conspiracy which commenced "at least as early as 1984" and continued "until the return of this indictment [January 10, 1991]." A review of Cruce's plea hearing (Appendix of Appellant, pp. A 063-A 094) and his sentencing hearing (Appendix of Appellant, pp. A 118-A 210) clearly establishes that Cruce entered a voluntary and knowing plea.

Moreover, the district court specifically found that Cruce offered no evidence that he withdrew from the conspiracy and that he continued his ownership and participation in the joint ventures, corporations, partnerships and property which was obtained with money illegally defrauded from Peoples unimpeded until the return of the indictment. Under these circumstances, we hold that the district court did not err in accepting his guilty plea to Count 1.

Cruce argues alternatively that the district court and the parties "were required to permit [him] to withdraw his plea of guilty" (Brief of appellant, p. 41) when it became apparent that the district court intended to sentence him based on the "boiler plate language in the

indictment alleging that the conspiracy continued until the return of this indictment." (Brief of Appellant, p. 41). We hold that the district court was not "required" to permit Cruce to withdraw his guilty plea:

> A district court's denial of a motion to withdraw a plea of guilty is reviewed for an abuse of discretion. *United States v. Rhodes*, 913 F.2d 839, 845 (10th Cir. 1990), *cert. denied*, ___ U.S. ___ (1991). Although "[o]ne who enters a guilty plea has no right to withdraw it," *United States v. Hickok*, 907 F.2d 983, 985 (10th Cir. 1990), quoting, *Barker v. United States*, 579 F.2d 1219, 1223 (10th Cir. 1978), a district court may permit withdrawal of a plea prior to sentencing "upon a showing by the defendant of any fair and just reason." Fed. R. Crim. P. 32(d). The defendant bears the burden of demonstrating a "fair and just reason." *United States v. Hickok, supra.*

United States v. Burger, Sl. Op., p. 9.

We hold that Cruce has failed to show a "fair and just reason" for withdrawing his plea. Cruce entered a voluntary and knowing plea upon the advice of counsel and after careful and extensive questioning by the district as to the nature and consequences of his plea. We reject Cruce's arguments that he was somehow "sandbagged" by "boiler plate language" in the indictment setting forth the time frame of the conspiracy.

The judgment of conviction is **AFFIRMED.** The cas
is **REMANDED,** however, for resentencing consisten
with this opinion.

Entered for the Court:

James E. Barrett,
Senior United States
Circuit Judge

United States District Court

_____ District of Kansas

UNITED STATES OF AMERICA

V.

James R. CRUCE

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
(Filed Sept. 15, 1991)

Case Number: 91-40002-03

Mark L. Bennett, Jr. – Retained
Defendant's Attorney

THE DEFENDANT:

[XX] pleaded guilty to count(s) 1, 18, 19, and 20 of a 25-count Indictment

[ ] was found guilty on count(s) _____ after plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)

(Please see next page for offenses.)

The defendant and government are both advised of their right to appeal this sentence.

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

[XX] Count(s) 2-17 and 21-25 (are) dismissed on the motion of the United States

[XX] It is ordered that the defendant shall pay a special assessment of $ 200, for count(s) 1, 18, 19, and 20, which shall be due [xx] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution costs, and special assessments imposed by this judgment are fully paid.

APPROVED: /s/ illegible
Assistant U. S. Attorney

Defendant's Soc. Sec. No.:
511-48-6881

Defendant's Date of Birth:
03/12/47

Defendant's
Mailing Address:
746 Victoria Heights
Salina, KS 67401

Defendant's
Residence Address:
746 Victoria Heights
Salina, KS 67401

8/5/91
Dated:

August 1, 1991
Date of Imposition of Sentence

/s/ DALE E. SAFFELS
Dale E. Saffels
Senior U.S. District Judge
Name & Title of
Judicial Officer

8-5-91
Date

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC § 371	Conspiracy to Defraud the United States and to Commit Crimes Against the United States	Jan. 10, 1991	
18 USC §§ 2 and 1344(2)	Scheme and Artifice to Obtain Monies, Funds, Credits, Assets, Securities, or Other Property Owned by or Under the Control of a Financial Institution	Dec. 14, 1987	1
18 USC §§ 2 and 1344(2)	Scheme and Artifice to Obtain Monies, Funds, Credits, Assets, Securities, or Other Property Owned by or Under the Control of a Financial Institution	Dec. 17, 1987	1
18 USC §§ 2 and 1344(2)	Scheme and Artifice to Obtain Monies, Funds, Credits, Assets, Securities, or Other Property Owned by or Under the Control of a Financial Institution	July, 1988	2

IMPRISONMENT

The defendant is hereby committed to the custody the United States Bureau of Prisons to be imprisoned the following manner:

Count 1:	5 years.
Count 18:	5 years (to run consecutive to Count 1).
Count 19:	4 years (to run consecutive to Counts 1 and 18).
Count 20:	5 years (to run concurrently with Count 1).

Total aggregated sentence is 168 months.

Both the government and defendant are advised that they have the right to appeal this sentence to the United States Court of Appeals, Tenth Circuit, Denver, Colorado.

[XX] The court makes the following recommendatio to the Bureau of Prisons:

The Court recommends that the defendant serve his sentence of imprisonment at a minimum security facility.

[ ] The defendant is remanded to the custody of t United States marshal.

[ ] The defendant shall surrender to the United Stat marshal for this district,

a.m.

[ ] at ____ p.m. on _____.

[ ] as notified by the United States marshal.

[XX] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

[XX] before 2 p.m. on August 26, 1991 .

[ ] as notified by the United States marshal.

[ ] as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

Defendant delivered on _____ to _____ a _____, with a certified copy of this judgment.

_____

United States Marshal

By _____

illegible

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years .

While on supervised release, the defendant shall not commit another federal, state or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of

supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[XX] The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[XX] The defendant shall not possess a firearm or destructive device.

[XX] The defendant shall not incur new credit charges or open additional lines of credit without the approval of the U. S. Probation Office.

[XX] The defendant shall provide the U. S. Probation Office access to any requested financial information of a personal nature and of any business in which he has any percentage of ownership, management responsibility, or fiduciary consult.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall

submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reason.

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

RESTITUTION AND FORFEITURE

RESTITUTION

[XX] The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution
Resolution Trust Corporation Mid-Central Consolidated Office Board of Trade Building No. 2 4900 Main Street Kansas City, MO 64112	$8,000,000

Payments of restitution are to be made to:

[ ] the United States Attorney for transfer to the payee(s).

[ ] the payee(s).

[XX] Clerk, U.S. District Court, Topeka, Kansas, for disbursement.

Restitution shall be paid:

[XX] in full immediately.

[ ] in full not later than _____.

[ ] in equal monthly installments over a period of _____ months. The first payment is due on the date this judgment. Subsequent payments are due monthly thereafter.

[ ] in installments according to the following schedule of payments:

The victim may assume responsibility for collection of any balance of restitution not paid pursuant to 18 USC § 3663(h)(2).

No credit for any amounts recovered under this Order may be made toward the restitution obligation of any other defendant.

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

FORFEITURE

[ ] The defendant is ordered to forfeit the following property to the United States:

STATEMENT OF REASONS

[XX] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 34

Criminal History Category: I

Imprisonment Range: 151 to 188 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 17,500 to $ 175,000

[XX] Fine is waived or is below the guideline range, because of the defendent's inability to pay.

Restitution: $ 80,000,000 +

[XX] Full restitution is not ordered for the following reason(s): Restitution of $8,000,000 is ordered because the defendant is not believed to have the necessary resources to pay the total $80,000,000+.

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds reason to depart from the sentence called for by application of the guidelines.

OR

[XX] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): The sentence is near the middle of the guideline range because no aggravating or mitigating circumstances can be identified to warrant further adjustment.

OR

The sentence may depart from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[XX] for the following reason(s): If appeal review determines the guidelines prior to the 1989 amendments are applicable, there are ample justifications to warrant an upward departure:

1) 18 U.S.C. § 3553(b), as cited in guideline § 5K2, indicates sentencing court may impose a sentence outside the range established by the applicable guideline if the court finds that there exists an aggravating or mitigating circumstance of a kind or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.

2) The guidelines say circumstances may warrant departure from the guidelines pursuant to this provision which, by their very nature, cannot be comprehensively listed and analyzed in advance.

3) The controlling decision as to whether and to what extent departure is warranted can only be made by the Court.

4) Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission.

5) The Court may depart from the guidelines even though the reason for departure is taken into consideration in the guidelines as a specific offense characteristic or other adjustment if the Court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.

6) Departure from the applicable guideline range in this case is warranted because the factors are present to a degree substantially in excess of that which ordinarily is involved in the offense or contemplated by the original guidelines.

7) When the Court accepted the guilty plea, it expressly retained the power to determine relevant factors bearing on sentencing.

8) The Sentencing Commission, in formulating the original guidelines did not formulate a scale that fully captured the harmfulness and seriousness of the conduct reflecting the loss in this case.

9) The most conservative figures developed indicate the cumulative losses produced by the common scheme or course of conduct are many times the range of the original scale.

10) Mr. Cruce violated a position of trust as Chief Executive Office of Peoples Heritage, directly influenced the granting of preferred loans skillfully manipulated the benefactor of special loans, personally received inappropriate benefit from many loans, and was instrumental in the personal loss to investors of monies not covered by insurance when Peoples Heritage failed.

11) Additionally, the Court has heard several weeks of evidence involving this case and Mr. Cruce's own direct testimony detailing his personal involvement.

12) It is therefore the finding of this Court that, should the original guidelines be applicable to this case, an upward departure for an aggregate sentence of 168 months is appropriate and justified.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Case No. 91-40002-01 Case No. 91-40002-03
v.	)	
THOMAS A. BURGER, JAMES R. CRUCE,	)	
Defendants.	)	

MEMORANDUM AND ORDER

(Filed July 12, 1991)

This matter is before the court on the motion of defendant Thomas A. Burger ("defendant Burger") and defendant James R. Cruce ("defendant Cruce"). Defendants move the court to apply the United States Sentencing Guidelines ("USSG") effective December 1988, when sentencing defendants in the above-captioned case. Defendants seek to avoid the application of two amendments which went into effect on November 1989, and November 1990. These amendments allow the court to factor in the total amount of loss suffered by a financial institution as a result of the offense and to also factor in whether the offense has substantially jeopardized the safety and soundness of a financial institution. *See* USSG § 2F1.1(b)(1)(S) and (6). In the alternative, Burger and Cruce move the court to allow them to withdraw their guilty pleas.

In addition, defendant Cruce asserts that restitution ordered by the court should be limited to those amounts attributable specifically to the conduct underlying his conviction.

On April 17, 1991, defendant Cruce entered a guilty plea to Counts 1, 18, 19, and 20 of the Indictment returned on January 10, 1991. This Indictment charged the defendants with conspiring to obtain monies from Peoples Heritage Federal Savings and Loan ("Peoples Heritage") by false or fraudulent pretenses in violation of 18 U.S.C. § 1344; making false, fictitious and fraudulent statements in violation of 18 U.S.C. § 1001; twenty-three counts of bank fraud in violation of 18 U.S.C. § 1344; and one count of making a false statement in violation of 18 U.S.C. § 1001. In his petition to plead guilty, accepted by the court on April 17, 1991, defendant Cruce stated:

> During the time period from 1984 through 1987, I entered into an agreement with other individuals, including Christopher Hashioka and James Boseler, whereby we set up an arrangement to purchase Ameriwest stock as it became available in large blocks on the open market in an attempt to keep the price of the stock up. At the time we entered into the agreement, I owned shares of the stock and since the stock price was going down it was to my benefit if I could keep the price from going down further. The agreement that we entered into involved a loan of $5,000,000 to James L. Boseler by Peoples Heritage Savings and Loan. Mr. Boseler was to loan the money to third parties so that they could acquire the stock on the open market and keep the price up.

Similarly, defendant Burger entered a plea of guilty to Counts 1, 16, 18, 19 and 20 of the Indictment on April 23, 1991. In his petition, defendant Burger made an identical factual statement, except that defendant Burger's statement also included the following language:

> My participation in any conspiracy terminated at the time I left Peoples Heritage Savings in December, 1988.

Upon satisfying itself that the requirements of Rule 11 of the Federal Rules of Criminal Procedure had been met, and that a factual basis existed to find that the defendants had committed the offenses to which they had pled guilty, the court accepted both defendants' guilty pleas.

I. APPLICATION OF THE AMENDED GUIDELINES

Defendants now contend that the court should sentence them in accordance with the Sentencing Guidelines in place during November 1988, or in the alternative, allow them to withdraw their guilty pleas to Count 1 of the Indictment. Defendants assert numerous reasons why they should be sentenced in accordance with the Sentencing Guidelines in effect on November 1, 1988. First, defendants contend that there exists no factual basis in the record for the determination that the defendants are guilty of a conspiracy that continued until the return of the Indictment on January 10, 1991. Second, defendants contend that the conspiracy ended with the last overt act alleged in the Indictment. Third, defendants contend that any alleged acts of concealment which occurred after the central objectives of the conspiracy had been attained, may not be used to extend the duration of the conspiracy

beyond the last overt act committed in furtherance of the conspiracy. Thus, in view of the foregoing, defendants contend that application of the Sentencing Guidelines would violate the *ex post facto* clause of the Constitution, as the conspiracy terminated prior to the effective date of the amendments effective November 1989, and November 1990.

Upon consideration of the parties' arguments and applicable law, the court finds that defendants' motions should be denied. Generally, when determining what sentence to be imposed, the Sentencing Guidelines provide that defendants are to be sentenced in accordance with the Guidelines in effect at the time of the sentencing. *See* 18 U.S.C. § 3553(a)(4) and (5) (1983). However, this rule is subject to constraints contained in the *ex post facto* clause of the Constitution of the United States of America. U.S. Const. art I, § 9, cl. 3. Thus, whenever, an amendment to the Sentencing Guidelines imposes a harsher penalty than that which would have been imposed at the time the offense was committed, the court must apply the earlier version. *See Miller v. Florida*, 482 U.S. 423, 429-30 (1987); *United States v. Smith*, 930 F.2d 1450, 1452 n. 3(10th Cir.), *cert.denied*, 110 S.Ct. 1786 (1991); *United States v. Swanger*, 919 F.2d 94, 95 (8th Cir. 1990); *United States v. McAllister*, 927 F.2d 136, 138 (3rd Cir. 1991); *United States v. Lam Kwong-Wah*, 924 F.2d 298, 304 (D.C. Cir. 1991). In determining whether the imposition of a criminal law violates the *ex post facto* prohibition, two elements must be found. These elements are: the law must be retrospective, or in other words, applied to events occurring before its enactment, and the law must disadvantage the offender affected by it. *Miller v. Florida*, 482 U.S. at 430.

Upon consideration of the present set of facts, the court finds that the application of the Sentencing Guidelines, as amended in November 1989, and November 1990, does not violate the *ex post facto* clause. First, the court finds that the offenses to which defendants Cruce and Burger have pled guilty are offenses which occurred subsequent to the effective dates of the amended Guidelines in question. Specifically, the court finds that both defendants pled guilty to Count 1 of the Indictment which alleges:

> Commencing at least as early as 1984, the exact date being unknown to the grand jury, and **continuing until the return of this indictment** [January 10, 1991], defendants, THOMAS A. BURGER, SHERWOOD E. BLOUNT, JR., JAMES R. CRUCE, CATHY (nee ALLIN) CRUCE, THOMAS D. DUNN, JR., JOSEPH GROSZ and KIM A. WISE knowingly and unlawfully combined, conspired, confederated and agreed with each other. . . . (emphasis added).

Thus defendants pled guilty to a crime which allegedly occurred subsequent to the effective dates of the November 1989, and November 1990.

Further, the court finds that defendants' assertion that there are no facts which support the continued existence of the conspiracy beyond the termination of their employment with Peoples Heritage is simply without merit. While it is true that the defendants were forced to resign from Peoples Heritage in November 1988, the court finds that the defendants continued their participation and ownership in the joint ventures, corporations, partnerships and property which was obtained with

money illegally defrauded from Peoples Heritage. Further, their participation in these ventures continued unimpeded until the issuance of the Indictment. Thus, while defendants may not have been employed by Peoples Heritage after November 1988, they had not extricated themselves from the joint ventures, partnerships and other entities which were set up to defraud Peoples Heritage and which continued into existence beyond the date of their forced resignations.

Further, the court finds that the forced resignation of defendants does not amount to an affirmative withdrawal or disavowal of the conspiracy as contemplated by the law. As stated by the Tenth Circuit Court of Appeals, "[i]n order to withdraw from a conspiracy an individual must take affirmative action, either making a clean breast to the authorities or communicating his withdrawal in a manner reasonably calculated to reach his co-conspirators." *United States v. Fox*, 902 F.2d 1508, 1516 (10th Cir.), *cert. denied*, 111 S. Ct. 199 (1990) (quoting *United States v. Parnell*, 581 F.2d 1374, 1384 (10th Cir.), *cert. denied*, 439 U.S. 1076 (1978)). Further, the burden of establishing withdrawal is on the defendants. *Fox*, 902 F.2d at 1516.

In this regard, the court finds that defendant Burger's consent decree to withdraw from his position with Peoples Heritage did not amount to an affirmative withdrawal from the conspiracy. Specifically, the court finds that defendant Burger was effectively removed from Peoples Heritage by the Resolution Trust Corporation ("RTC") following an investigation which revealed numerous conflicts of interest on the part of defendant Burger. Such removal is not an affirmative disavowal of the conspiracy. Further, the court finds that although

defendant Burger agreed to not continue his involvement with Peoples Heritage, he did not remove himself from his ownership and participation in the joint ventures and partnerships which had been set up to defraud People's Heritage and which remained under his control until the return of the Indictment. Thus, the court finds that defendant Burger has not carried his burden of proving that he had withdrawn from the conspiracy in November 1988.

The court further finds that defendant Burger's statement that his role in the conspiracy terminated in November 1988, made in conjunction with his petition to enter a plea of guilty, does not limit the court to making such factual finding for purposes of sentencing defendant Burger. When determining whether to accept defendant Burger's petition, the court had to make a finding that a factual basis exists to find that the defendant committed the offense to which he has pled guilty. *United States v. Montova-Camacho*, 644 F.2d 480, (5th Cir. 1981). Thus, in this case the court had to make a finding that a factual basis exists which would satisfy the four elements of a conspiracy, as specifically set forth in *United States v. Hines*, 696 F.2d 722, 733 (10th Cir. 1982). These elements do not require the court to make a finding as to the duration of the conspiracy. Further, to allow a defendant to avoid the application of the amended guidelines by fashioning his plea would be to allow the defendant to amend the Indictment. Amendment of the Indictment may only be accomplished by resubmission to the grand jury. *United States v. Russell*, 369 U.S. 749, 769 (1963).

Further, because the defendant Burger was a participant in the overall conspiracy, his contention that he did not commit any overt acts after November 1988 is

unavailing. As the Tenth Circuit held in *United States v. Williams*, 897 F.2d 1034, 1040 (10th Cir.), *cert. denied*, 111 S. Ct. 2064 (1991) absent any affirmative withdrawal, a defendant remains a part of the ongoing criminal enterprise. Thus, because the court has found that the conspiracy continued in existence beyond the effective dates of the amended guidelines and that defendant Burger had not effectively withdrawn from the conspiracy, the court finds that application of the amended guidelines does not violate the *ex post facto* clause of the Constitution.[1]

Similarly, with respect to defendant Cruce, the court finds that Cruce has offered no evidence that he withdrew from the conspiracy in November 1988. Defendant Cruce simply rests on his assertion that no overt acts in furtherance of the conspiracy occurred after November 1988. For the above reasons previously stated in regard to defendant Burger, the court finds that application of the amended Guidelines is appropriate when sentencing defendant Cruce.[2] Accordingly, the court will deny

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[1] The court further notes that application of the amended Guidelines does not violate the *ex post facto* clause because the sentence which may be properly imposed under the unamended Guidelines would be similar in duration. Under the 1987 Guidelines, the court can make an upward departure from the Guidelines upon finding that factors warranting such departure exist. *United States v. Fortenbury*, 917 F.2d 477, 478 (10th Cir. 1990). The court finds that this case does present such factors. Thus, the court notes that the second requirement necessary to establish a violation of the *ex post facto* clause, *i.e.*, that the more recent law impose a harsher penalty than was available at the time the offense was committed, is not satisfied.

[2] The court notes that the case on which defendant relies to establish and limit the duration of the conspiracy are inapplica-

defendant Cruce's motion to apply the 1987 Sentencing Guidelines.

II. WITHDRAWAL OF GUILTY PLEAS

In the event that the court determines that the recent amendments to the Sentencing Guidelines are applicable, defendants Burger and Cruce have moved the court to allow the withdrawal of their guilty pleas.

Rule 32(d) of the Federal Rules of Criminal Procedure provides that prior to sentencing, "the court may permit withdrawal of a plea upon a showing by the defendant of any fair and just reason." Whether to allow a defendant to withdraw a guilty plea is within this court's sound discretion. *United States v. Rhodes*, 913 F.2d 839, 845 (10th Cir.), *cert. denied*, 111 S.Ct. 1079 (1991). Once a defendant has entered a guilty plea he has no right to withdraw it. *United States v. Hickok*, 907 F.2d 983, 985 (10th Cir. 1990) (quoting *Barker v. United States*, 579 F.2d 1219, 1223 (10th Cir. 1978)). Further, "the defendant bears the burden of demonstrating a 'fair and just reason' for withdrawal of his guilty plea." *Hickok*, 907 F.2d at 985. In determining whether a defendant has established a "fair and just reason" the court should consider the following factors:

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ble. Specifically, the court finds that *United States v. Fiswick*, 329 U.S. 211, 217 (1946) dealt with the admissibility of statements made by co-conspirators after their arrest. Further, the court finds that *Grunewald v. United States*, 353 U.S. 391 (1957) dealt with the issue of establishing that the overt acts in furtherance of the conspiracy occurred within the statute of limitations period.

> (1) whether the defendant has asserted his innocence;
> (2) whether withdrawal would prejudice the government;
> (3) whether the defendant delayed in filing his motion;
> (4) whether withdrawal would substantially inconvenience the court;
> (5) whether close assistance of counsel was available to the defendant;
> (6) whether the plea was knowing and voluntary; and
> (7) whether the withdrawal would waste judicial resources.

Rhodes, 913 F.2d at 845.

Upon consideration of the above factors, the court finds that defendants' motions should be denied. First, the court finds that neither defendant has asserted his innocence. Rather, each defendant is upset with the severity of the sentence which has been recommended in the presentence investigation reports. Such a reason does not provide a "fair and just reason" for the withdrawal of a guilty plea. *See United States v. Michaelson*, 552 F.2d 472, 475 (2nd Cir. 1977) (defendant's change of mind regarding his plea after his codefendants' trial and after his review of the presentence report did not warrant the granting of a motion to withdraw plea); *United States v. Marshall*, 510 F.2d 792, 795 (D.C. Cir. 1975); *United States v. Needles*, 472 F.2d 652, 654 (2nd Cir. 1973).

Second, the court finds that both defendants had close assistance of counsel prior to entering into their guilty pleas. Thus, this factor does not mitigate in favor of either defendant's motion to withdraw his plea.

Third, the court finds that withdrawal of their guilty pleas would prejudice the government significantly because both defendants would have to be tried. The facts of this case are extremely complicated and the defendants have delayed in moving to withdraw their pleas until completion of a five-week trial in which several codefendants were acquitted. Had defendants sought to withdraw their guilty pleas prior to the commencement of the trial of their codefendants, the government could have tried all of the indicted defendants at one time. Further, in this regard, the court finds that withdrawal of defendants' guilty pleas would be a substantial waste of judicial resources. Indeed, the court finds that because the defendants are primarily upset with their anticipated sentences, defendant may properly challenge the sentence ultimately imposed by this court through the appellate process.

Finally, the court further finds that defendants have offered no evidence to support their contention that their pleas were not entered into voluntarily in accordance with Fed. R. Crim. P. 11. Both defendants were apprised that they could be imposed maximum sentences of five years per count, and a maximum find of $250,000. Further, the court finds that the defendants were informed that the Guidelines would be applied. Finally, the court finds that the defendants were informed that they would not be allowed to withdraw their guilty pleas if they were dissatisfied with their sentences. Thus, the court finds no basis exists for the defendants' assertion that their pleas were not knowingly and voluntarily entered. Accordingly, having found no "fair and just reason" to allow the withdrawal of the defendants' guilty pleas, the court will

deny their alternative motion to withdraw their pleas to Count I of the Indictment.

III. AMOUNT OF RESTITUTION

Defendant Cruce has moved the court to limit any restitution order to those amounts attributable specifically to the conduct underlying his conviction.

In determining the amount of restitution, the court is to consider the amount of loss as result of the offense, the financial resources of the defendant, the defendant's earning capabilities, and other factors which the court finds appropriate. 18 U.S.C. § 3664(a). According to the United States Supreme Court, an order of restitution can only be based on the amount of injury suffered by the victim as a result of the criminal conduct for which the defendant has been convicted or has pled guilty. *Hughey v. United States*, 110 S. Ct. 1979, 1983-84 (1990). It is generally inappropriate to include in a restitution order injuries suffered by the defendant's acts that are separate from the particular offense for which the defendant was convicted, notwithstanding that the injury is related or of a similar scheme. *Hughey*, 110 S. Ct. at 1984.

In this case, the court finds that restitution may be properly based upon those losses which have resulted from defendant Cruce's conduct in Counts 1, 18, 19 and 20. Defendant Cruce has moved the court to limit its calculation of the loss to the RTC to those amounts specifically alleged in Counts 18, 19 and 20. The court finds that this limitation is simply inappropriate. The court may also consider those losses which are attributable to defendant Cruce's conduct on Count 1. Such conduct is

not limited to that conduct described in Counts 18, 19 and 20. Accordingly, the court finds that losses which may be properly considered by the court would entail those suffered by the RTC as a result of the overall conspiracy alleged in Count 1. Further, in determining this loss, the court finds that 18 U.S.C. § 3664(d) allows the court to base this determination on findings contained in the presentence report or other testimony or evidence supported by a preponderance of the evidence. Thus, the court finds that defendant Cruce's motion to limit restitution to those specific amounts alleged in Counts 18, 19, and 20 must be denied.[3]

IT IS BY THE COURT THEREFORE ORDERED that defendant Burger's motion to sentence Burger under the Sentencing Guidelines effective in December 1988 or, in the alternative, to allow the defendant to withdraw his plea is denied.

IT IS FURTHER ORDERED that defendant Cruce's conditional motion to withdraw plea of guilty and motion for determination that the 1987 Sentencing Guidelines govern the sentencing of defendant rather than the 1989 and 1990 amendments to said guidelines and that restitution is limited to the counts pled to is denied.

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[3] The court further notes that defendant Cruce's reliance upon *United States v. Sharp*, 927 F.2d 1083 (9th Cir. 1991) is misplaced. This decision has been withdrawn by the Ninth Circuit Court of Appeals, and thus, it may not be properly relied upon.

Dated this 31 day of July 1991, at Topeka, Kansas.

/s/ DALE E. SAFFELS
DALE E. SAFFELS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Case No. 91-40002-01 Case No. 91-40002-03
v.	)	
THOMAS A. BURGER, JAMES R. CRUCE,	)	
Defendants.	)	

MEMORANDUM AND ORDER
(Filed Aug. 22, 1991)

This matter is before the Court on the motions of defendant Thomas A. Burger ("defendant Burger") and defendant James R. Cruce ("defendant Cruce") for recusal; defendant Burger's motion for reconsideration of this court's order denying his motion to withdraw his plea or for resentencing and to dismiss the Indictment; defendant Burger's motion for a *Franks* hearing; and defendant Burger's motion for bail pending disposition of the motion for reconsideration, or pending appeal. Also before the court is defendant Cruce's motion for reconsideration, and to vacate the sentence and for resentencing.

Defendants Burger and Cruce pled guilty to certain counts contained in an indictment returned on January 10, 1991. This Indictment charged defendants with conspiring to obtain monies from Peoples Heritage Federal Savings and Loan ("Peoples Heritage") by false or fraudulent pretenses in violation of 18 U.S.C. § 1344; making

false, fictitious and fraudulent statements in violation of 18 U.S.C. § 1001; and 23 counts of bank fraud in violation of 18 U.S.C. § 1344.

On April 17 and 23, 1991, the court accepted defendants Cruce and Burger's guilty pleas. Following the preparation of the Presentence Investigation Reports by the United States Probation Office, both defendants contested the recommendation that the United States Sentencing Guidelines ("Sentencing Guidelines"), as amended in 1988, and 1989, were applicable to the defendants' sentences. Subsequently, defendants Burger and Cruce filed motions requesting that they be sentenced under the Sentencing Guidelines effective during November 1988, or in the alternative, that they be allowed to withdraw their guilty pleas. On July 31, 1991, this court issued a Memorandum and Order in which it denied defendants' motions. Both defendants were sentenced on August 1, 1991, under the amended Sentencing Guidelines. Defendant Burger was sentenced to 12 years imprisonment and was ordered to pay $6,000,000 in restitution. Defendant Cruce was sentenced to 14 years imprisonment and was ordered to pay $8,000,000 in restitution. Defendants now contend that the court's previous ruling and sentences imposed were based upon improper *ex parte* contact between the prosecution and the court. Thus, defendants contend this court should recuse itself, and vacate its sentences as imposed on August 1, 1991.

MOTIONS TO RECUSE OR DISQUALIFY

Defendants move the court to recuse itself pursuant to 28 U.S.C. §§ 144 and 455. Whether to recuse itself is a

matter within this court's discretion. *Weatherhead v. Globe Int'l, Inc.*, 832 F.2d 1226, 1227 (10th Cir. 1987); *Hinman v. Rogers*, 831 F.2d 937, 938 (10th Cir. 1987). Title 28, United States Code, Section 144 provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding. The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists. . . .

In determining whether the affidavits are sufficient to establish that a judge has a personal bias or prejudice against him or in favor of an adverse party, the court must accept the truth of the facts alleged. *Hinman*, 831 F.2d at 939 (citing *United States v. Gigax*, 605 F.2d 507, 511 (10th Cir. 1979)). Nonetheless, "conclusions, rumors, beliefs, and opinions are not sufficient to form a basis for disqualification." *Hinman*, 831 F.2d at 939. Further, the affidavit must state with particularity the "facts of time, place, persons, occasion, and circumstances." *Id.* Finally, the "affidavit is strictly construed against the affiant, and there is a substantial burden on the moving party to demonstrate the judge is not impartial." *Id.*

A different standard for recusal applies under 28 U.S.C. § 455. Under this section, the applicable test is "whether a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality." *United States v. Hines*, 696 F.2d 722, 728 (10th Cir.

1982). Under this provision, the factual allegations contained in the affidavit do not have to be taken as true. *Hinman*, 831 F.2d at 939 (citing *United States v. Greenough*, 782 F.2d 1556, 1558 (11th Cir. 1986)). Moreover, a court is not limited to those facts asserted in the affidavit. *Hinman*, 831 F.2d at 939 (citing *Gilbert v. Little Rock*, 722 F.2d 1390, 1398 (8th Cir. 1983) (judge may consider all the circumstances)).

Upon consideration of the defendants' motions and applicable law, the court finds that the defendants' motions for recusal should be denied. First, and perhaps of foremost importance, the court finds that the basis upon which defendants' motions are founded, *i.e.*, that *ex parte* contact occurred between the court and the prosecution thereby prejudicing the court against the defendants, is faulty. Quite simply, no *ex parte* communication occurred between the prosecution and the court. *Black's Law Dictionary* defines *ex parte* as "on one side only; by or for one party; done for, in behalf of, or on the application of, one party only." The affidavits filed by both defendants allege improper contact between the court and the FDIC and RTC. However, the court finds that the letters complained of by the defendants are letters from the victim of the defendants' crimes, not from the prosecution. Thus, even assuming the factual allegations contained in the affidavits are true, the facts simply do not support that any *ex parte* contact occurred between the court and the prosecution. Indeed, the letters are part of the victim impact aspect of the presentence investigation which the probation office is statutorily required to

investigate and request.[1] *See* 18 U.S.C. §§ 3663 and 3664. Letters such as these are routinely received by the court and are forwarded to the United States Probation Office so that a proper investigation may be conducted in accordance with the Congressional mandate that the impact on the victim be assessed.[2] Subsequently, allegations contained in such letters are then either excluded or included in the Presentence Investigation Report so that the parties have a chance to dispute and refute any factual allegations. This was the manner in which the letters from the FDIC and its Chairman, L. William Seidman were handled.

Further, the court finds that defendants' affidavits contain no statements made by this court which would indicate that it is biased toward either side in this case, or that it was relying upon allegations contained in the

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[1] The court further notes that in their plea agreements, defendants consented to the submission of such information by the federal regulatory bodies involved.

[2] The court notes that letters from those who wish to speak on behalf of the defendant for a light sentence are treated in the same manner. Under the interpretation asserted by the defendants, such contacts would be impermissible *ex parte* communications.

Further, the court finds that the amount of restitution sought by the victim $6,000,000 and $8,000,000 was the amount which had been promoted by the probation office. It is not improper for a court to hold a presentence conference with the probation staff. *See United States v. Story*, 716 F.2d 1088, 1090 (6th Cir. 1988). Further, the court notes that under applicable law, the court could have imposed an amount in restitution many times that which was ultimately imposed. The court's position with respect to restitution was spelled out in its Memorandum and Order of July 31, 1991.

letters in dispute. Rather, the defendants' complaints center around the court's previous rulings. Recusal may not be based upon judicial bias, *i.e.*, the judge's view of the law. Rather, it must be personal. As the Tenth Circuit has stated, "[a] motion to recuse cannot be based solely on adverse rulings." *Willner v. Budig*, 848 F.2d 1032, 1035 (10th Cir. 1988), *cert. denied*, 488 U.S. 1031 (1989) (citing *Willner v. University of Kansas*, 848 F.2d 1023, 1028 (10th Cir. 1988) (per curiam), *cert. denied*, 488 U.S. 1031 (1989)); *See also Antonello v. Wunch*, 500 F.2d 1260, 1262 (10th Cir. 1974); *United States v. Story*, 716 F.2d at 1090. Moreover, rumors, beliefs, conclusions and opinions are not sufficient to form a basis for disqualification. *Hinman*, 831 F.2d at 939.

The court finds that defendants' affidavits contain speculation and unfounded conclusions. Further, any personal knowledge of the facts of this case held by the court was derived solely from presiding over a lengthy trial of codefendants. Personal knowledge derived from presiding over a trial of codefendants may be considered by a court when imposing a sentence. *See United States v. Beaulieu*, 893 F.2d 1177, 1179 (10th Cir. 1990), *cert. denied*, 110 S. Ct. 3302 (1990). Thus, defendants' motions for recusal due to personal bias resulting from *ex parte* contact under 28 U.S.C. § 144 must fail.

Moreover, when applying the standard for recusal under 28 U.S.C. § 455, the court finds that in this case, a reasonable person knowing all the relevant facts would not harbor doubts about the judge's impartiality. The court finds that its earlier ruling which denied the defendants' motions for sentencing under the 1988 Sentencing Guidelines, or in the alternative, to withdraw their guilty

pleas, was based upon express findings contained in its Memorandum and Order filed on July 31, 1991. Clearly, the finding made by the court that the defendants should be sentenced according to the Sentencing Guidelines, as amended, was based upon two factors, namely that the defendants pled guilty to a conspiracy continuing up until the issuance of the Indictment on January 10, 1991, and that the defendants continued their involvement in the conspiracy beyond the effective dates of the amended guidelines. *See United States v. Morrison*, ___ F.2d ___ (10th Cir. 1991), 1991 WL 115460, (No. 90-1364, filed July 2, 1991) (citing *United States v. Broce*, 488 U.S. 563, 570 (1989)); *see also United States v. Edgecomb*, 910 F.2d 1309, 1312 (6th Cir. 1990) ("If [defendant] disagreed with the dates of the [scheme], he should have attempted to negotiate a change in the plea agreement"). Thus finding was simply not founded on unsubstantiated allegations of witness tampering, as defendant Burger asserts.[3]

Further, the court finds that each sentencing calculation ultimately made by the court was expressly based upon factual findings as appended to the Presentence Report, and oral findings made at the time of sentencing. Such a method of making findings is satisfactory. *See United States v. Golightly*, 811 F.2d 1366, 1367 (10th Cir. 1987). Similarly, the court finds that any departure from

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[3] Moreover, the court notes that defendant Burger had an opportunity to refute these allegations, and that they were stricken from the Presentence Investigation Report. Thus, these allegations were simply not a factor considered when the court imposed defendant Burger's sentence.

the Sentencing Guidelines, in the event that the defendants are to be sentenced under the original Sentencing Guidelines, was expressly supported by factual findings based upon evidence which the defendants were given an opportunity to refute prior to sentencing.[4] Thus, the court finds that in considering all of the relevant facts and circumstances of this case, a reasonable person would not find the court to be biased in its previous rulings both in the denial or defendants' motions for sentencing under the 1988 Sentencing Guidelines, or in the sentences ultimately imposed. Quite simply, the defendants have failed to demonstrate that the court relied upon improper information, or for that matter, that the court had received any improper information. *United States v. Kenny,* 645 F.2d 1323, 1348 (9th Cir. 1981), *cert. denied,* 452 U.S. 920 (1981). The two letters in dispute were not used in determining the sentences. Rather, the sentences were based upon the information contained in the Presentence Investigation Report, as amended and adopted by the court following two separate evidentiary hearings involving objections of both defendants. In addition, the court considered its personal knowledge derived from presiding over the lengthy trial of defendants' alleged co-conspirators. Neither source of information is improper.

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[4] In this regard, the court notes that both defendants Cruce and Burger were sent notice on July 25, 1991, that various factors had been identified by the probation office which would warrant an upward departure. Response of the Government in Opposition to Defendant Burger's Motions, exhibit 1 (Doc. 375). This notice listed factors and reasons which support an upward departure. Such notice is sufficient. *United States v. Fortenbury,* 917 F.2d 477, 480 (10th Cir. 1990).

MOTIONS FOR RECONSIDERATION

The court finds that in disposing of defendants' motions for recusal, it has dealt with defendants' motions for reconsideration which are primarily based upon defendants' allegation of *ex parte* contact with the prosecution. Nonetheless, the court further finds that it has previously reviewed and rejected defendants' contention that the Rule 11 hearings conducted prior to accepting defendants' guilty pleas were infirm. The court finds that both defendants were informed that they were to be sentenced under the Sentencing Guidelines, and that they could be sentenced to the maximum of five years per count and that punishment for each count could be ordered to run consecutively. Thus, the court finds that the requirements of Rule 11, *i.e.*, that the defendant be informed of the maximum sentence which could be imposed, were satisfied and that the court's denial of defendants' motions to withdraw their guilty pleas was proper. *See United States v. Williams*, 919 F.2d 1451, 1456 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 1604 (1991).

The court further finds that the fact that an estimate made by a defendant's attorney with respect to the maximum sentence which may be imposed does not coincide with one the court ultimately imposes, is not a proper ground for the withdrawal of a plea. *See United States v. Stephens*, 906 F.2d 251, 253-54 (6th Cir. 1990); *United States v. Garcia*, 909 F.2d 1346, 1348 (9th Cir. 1990).[5] Thus, the

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[5] Further, to the extent that defendant seeks to reassert the argument that the court failed to make a factual finding that the conspiracy, as alleged in the Indictment existed, the court finds that it has previously reviewed and rejected this argument, the court will not revisit it.

court's denial of defendants' motions to withdraw their guilty pleas was proper, and defendants' motions for reconsideration will be denied.[6]

FRANKS HEARING

Defendants move the court for an evidentiary hearing. In support, defendants cite *Franks v. Delaware*, 438 U.S. 154 (1978). Whether a defendant is entitled to an evidentiary hearing in regard to sentencing, is a matter within this court's discretion. *United States v. Rutter*, 897 F.2d 1558, 1565 (10th Cir. 1990); *United States v. Peterman*, 841 F.2d 1474 (10th Cir. 1988). Further, where the dispute is more legal than factual, a hearing is not required. *Rutter*, 894 F.2d at 1565.

The court finds that the dispute in this case focuses primarily upon the court's decision to apply the amended Sentencing Guidelines. Because this dispute is primarily legal, the court finds that no evidentiary hearing will advance the resolution of this matter. Accordingly, the

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[6] The court further finds that defendants' arguments that the Indictment violates the double jeopardy clause, and thus, should be dismissed are without merit. The crimes charged in this Indictment involve bank fraud, under the relevant statute, 18 U.S.C. § 1344, an offense occurs upon each execution or attempted execution of a scheme to defraud. *United States v. Poliak*, 823 F.2d 371, 372 (9th Cir. 1987), *cert. denied*, 485 U.S. 1029 (1988). Thus, each count of the Indictment involving a draw upon a line of credit would constitute a separate execution of the scheme and would be punishable as a separate crime. The court further notes that this argument is untimely because it was first raised in defendants' motions for reconsideration. Fed. R. Crim. P. 12(f).

court will deny defendant Burger's motion for a *Franks* hearing.

BAIL PENDING APPEAL

Finally, defendant Burger has filed a motion requesting an order granting bail pending appeal pursuant to Fed. R. Crim. P. 46(c) and 18 U.S.C. § 3143. Defendant Burger has also moved the court for expedited consideration of his motions. The court will grant defendant Burger's motion insofar as he requests expedited consideration.

Title 18, United States Code, Section 3143(b) provides:

> **Release or detention pending appeal by the defendant.** – (1) Except as provided in paragraph (2), the judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds –
>
> > (A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) of this title; and
> >
> > (B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in –
> >
> > (i) reversal,
> >
> > (ii) an order for a new trial,

> (iii) a sentence that does not include a term of imprisonment, or
>
> (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process. . . .

In applying this provision, the defendant must first establish by clear and convincing evidence that defendant is not likely to flee or pose a danger to the safety of any other person or to the community if released, and that the defendant has established by a preponderance of the evidence that the appeal has not been filed for purposes of delay. Further, the court must find that the appeal raises a substantial question of law or fact; and that if the substantial question is determined favorably to the defendant on appeal, that decision is likely to result in reversal or an order for a new trial of all counts on which imprisonment has been imposed. *United States v. Affleck*, 765 F.2d 944, 953 (10th Cir. 1985).

Following the defendant's establishment of the first two criteria, the court must follow a two-step analysis. *See Affleck*, 765 F.2d 944, 952 (10th Cir. 1985) (citing *United States v. Miller*, 753 F.2d 19 (3d Cir. 1985)). Accordingly, the court must first determine whether the appeal raises a "substantial" question of law or fact. Second, the court must determine whether a favorable ruling for the defendant on appeal would result in reversal or an order for a new trial of *all* counts on which imprisonment has been imposed. *Affleck*, 765 F.2d at 952. A "substantial question" is a " 'close question or one that very well could be decided the other way.' " *Id.* (internal quotes omitted) (quoting *United States v. Giancola*, 754 F.2d 898, 901 (11th

Cir. 1985), *cert. denied*, 479 U.S. 1018 (1986)). Whether a particular question is "substantial," is a question which must be ultimately decided upon a case-by-case basis. *Affleck*, 765 F.2d at 952.

Upon consideration of the arguments and authorities cited by the parties, the court finds that defendant Burger's motion for bail pending appeal must be denied. Initially, the court notes that defendant Burger has not sought to establish the first two requirements that he is not likely to flee and that the appeal is not filed for purposes of delay. Thus, the court finds that defendant Burger's motion should be denied on that basis alone. Further, the court finds that the question on appeal, namely whether the defendant may be properly sentenced under the amended guidelines because he has pled guilty to a crime which continued beyond the effective date of the Indictment, is not a "substantial question." As previously cited by the court, the Tenth Circuit Court of Appeals has held that a defendant may be sentenced in accordance with the crime, as charged in the Indictment, to which he pled guilty to. *See Morrison*, ___ F.2d ___ (10th Cir. 1991), 1991 WL 115460 (citing *United States v. Broce*, 488 U.S. 563 (1989)). Thus, because the issue raised by the defendant has been decided by controlling precedent, it may not be properly characterized a "substantial" question. *Affleck*, 765 F.2d at 952. Further, the court finds that reversal of this court's decision will not lead to a new trial on *all* counts. Defendant Burger has never contested his conviction with respect to four of the five counts to which he pled guilty. Finally, reversal would simply lead to resentencing, which would not be a reduced sentence to a term of imprisonment less than the

total of the time already served plus the expected duration of the appeal process. Accordingly, for the foregoing reasons, the court finds that defendant Burger's motion for bail pending appeal will be denied.

IT IS BY THE COURT THEREFORE ORDERED that the motion of defendant Burger for reconsideration of the order denying his motion to withdraw the plea or for resentencing, to dismiss the Indictment, and for a *Franks* hearing (Doc. 368) is denied.

IT IS FURTHER ORDERED that the motion of defendant Burger for recusal under 28 U.S.C. § 144 and 28 U.S.C. § 455 (Doc. 372) is denied.

IT IS FURTHER ORDERED that the motion of defendant Burger for an evidentiary hearing and for oral argument (Doc. 374) is denied.

IT IS FURTHER ORDERED that the motion of defendant Burger for bail pending consideration of the motion for reconsideration, and if that is denied, pending appeal, and for expedited consideration of the motion (Doc. 380) is denied in part, and granted in part, consistent with the above memorandum and order.

IT IS FURTHER ORDERED that the motion of defendant Cruce to disqualify and recuse (Doc. 365) is denied.

IT IS FURTHER ORDERED that the motion of defendant Cruce for reconsideration and to vacate sentence and for resentencing (Doc. 366) is denied.

IT IS FURTHER ORDERED that the original sentences and reporting dates are affirmed and remain in place.

Dated this 22 day of August 1991, at Topeka, Kansas.

/s/ DALE E. SAFFELS
DALE E. SAFFELS
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAMES R. CRUCE, Defendant-Appellant.	)	No. 91-3274

ORDER
Filed July 21, 1992

Before McKAY, Chief Judge, BARRETT, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, Circuit Judges, and BRIMMER*, District Judge.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned case.

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*The Honorable Clarence A. Brimmer, United States District Judge for the District of Wyoming, sitting by designation.

Upon consideration whereof, the petition for rehearing is denied by the panel who rendered the decision sought to be reheard.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to the members of the panel and to all the judges of the court in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By: /s/ Kelly Clason
Kelly Clason
Deputy Clerk

Supreme Court, U.S.
FILED
FEB 8 1993
OFFICE OF THE CLERK

No. 92-828

In the Supreme Court of the United States

OCTOBER TERM, 1992

JAMES R. CRUCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court violated the Ex Post Facto Clause when it applied Sentencing Guidelines amendments that became effective in 1989 and 1990 to petitioner, who pleaded guilty to a conspiracy that continued into 1991.

2. Whether the district court erred in accepting petitioner's guilty plea and in refusing to allow him to withdraw that plea.

3. Whether the court of appeals erred in refusing to order the district judge to recuse himself from petitioner's resentencing.

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In the Supreme Court of the United States

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JAMES R. CRUCE, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1-14, is unpublished, but the judgment is noted at 968 F.2d 21 (Table). Two orders of the district court, Pet. App. 28-41 and 42-56, are reported at 770 F. Supp. 598 and 773 F. Supp. 289.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 1992. A petition for rehearing was denied on July 21, 1992. Pet. App. 57-58. The petition for a writ

of certiorari was filed on October 19, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty to one count of conspiracy to defraud and three counts of defrauding a federally chartered and insured savings and loan institution, in violation of 18 U.S.C. 371 and 1344 (1988 & Supp. III 1991). He was sentenced to 168 months' imprisonment and ordered to pay $8 million in restitution. The court of appeals affirmed the conviction, but remanded for resentencing.

1. Petitioner was the president of Peoples Heritage Savings and Loan of Salina, Kansas. Pet. App. 2. Petitioner also sat on the board of directors of Peoples Heritage and owned 50% of the savings and loan's parent company. *Ibid.* Through various devices and schemes, petitioner and others appropriated more than $80 million from Peoples Heritage. Pet. App. 24. The grand jury returned two indictments against petitioner. One indictment charged petitioner with 13 counts of conspiracy and bank fraud. Gov't C.A. Br. 6 n.2. The other indictment charged petitioner with 25 counts of conspiracy, bank fraud, and making false statements to a federal agency. C.A. App. A1-A47.

Pursuant to a plea agreement, petitioner pleaded guilty to four of the counts charged in the 25-count indictment—one count of conspiracy and three counts of bank fraud. Pet. App. 2. The three substantive counts involved a scheme to appropriate funds for petitioner and others by setting up a sham line of credit at Peoples Heritage. *Ibid.*; see C.A. App. A35-

A41. In return, the government agreed to dismiss the remaining counts of the 25-count indictment and all the counts of the 13-count indictment. The government also agreed to forgo any additional prosecution of petitioner in the District of Kansas for transactions involving Peoples Heritage, to recommend to any other prosecuting authorities that any sentence for transactions involving Peoples Heritage run concurrently with the sentence imposed in this case, not to oppose petitioner's request regarding the place of his incarceration, and to recommend a downward departure based on acceptance of responsibility. C.A. App. A58.

The district court sentenced petitioner to 168 months' imprisonment and ordered him to pay $8 million in restitution. Pet. App. 18, 22. In determining the sentence, the district court applied amendments to Sentencing Guidelines § 2F1.1 that became effective in 1989 and 1990. See Pet. App. 3. As compared to the 1988 Guidelines, the amendments authorized a 13-level increase in petitioner's base offense level. See Pet. 9-10. Because the court found that petitioner's involvement in the conspiracy continued past the effective date of the amended Guidelines, the court rejected petitioner's claim that the application of those Guidelines violated the Ex Post Facto Clause, Art. I, § 9, Cl. 3. Pet. App. 30-36. The district court also refused to allow petitioner to withdraw his guilty plea. Pet. App. 36-39.

After petitioner was sentenced, he learned that the Resolution Trust Corporation (RTC) and the Federal Deposit Insurance Corporation (FDIC) had sent letters to the district court discussing his case. See C.A. App. A322-A337 (RTC letter); C.A. App. A338

(FDIC letter). Because he considered the letters improper ex parte contacts, petitioner asked the district judge to recuse himself. Petitioner also moved for reconsideration of his sentence. The district court denied both motions. Pet. App. 55.

2. The court of appeals affirmed the conviction, rejecting petitioner's contention that the district court erred in accepting his guilty plea and refusing to allow him to withdraw his plea. Pet. App. 12-13. The court also rejected most of petitioner's challenges to his sentence, including his claim that the district court's application of the amended Sentencing Guidelines violated the Ex Post Facto Clause. Pet. App. 5-6. The court vacated the sentence and remanded for resentencing, however, to give petitioner an opportunity to comment on the RTC and FDIC letters. Pet. App. 10-11, 14. The court of appeals held that the district judge was not required to recuse himself from petitioner's resentencing. Pet. App. 9-11. Although the mandate issued on July 29, 1992, petitioner has not yet been resentenced.[1]

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[1] Thomas Burger was the chief lending officer for Peoples Heritage and served on the board of directors. C.A. App. A2. Burger pleaded guilty to one conspiracy count and four substantive counts of bank fraud, all arising out of the same sham loan transaction to which petitioner pleaded guilty. The court of appeals affirmed Burger's conviction, but remanded for resentencing to enable Burger to comment on letters from RTC and FDIC discussing his case. *United States* v. *Burger*, 964 F.2d 1065 (10th Cir. 1992). Burger has filed a petition for a writ of certiorari, No. 92-7196, to which the United States will respond separately. Burger was resentenced on December 29, 1992, and has appealed his new sentence to the Tenth Circuit.

ARGUMENT

1. Petitioner contends that the district court's use of the amended Sentencing Guidelines violated the Ex Post Facto Clause. Pet. 15-19.[2]

When acts constituting a continuing offense occur both before and after the effective date of a Guidelines amendment, it does not violate the Ex Post Facto Clause to sentence the defendant under the amended Guidelines. See, *e.g.*, *United States* v. *Morrison*, 938 F.2d 168, 170 (10th Cir. 1991); *United States* v. *Story*, 891 F.2d 988, 995 (2d Cir. 1989); *United States* v. *White*, 869 F.2d 822, 826 (5th Cir.), cert. denied, 490 U.S. 1112 (1989). That is true of a conspiracy commencing before and continuing beyond the effective date of the Guidelines. See, *e.g.*, *United States* v. *Williams*, 897 F.2d 1034, 1040 (10th Cir. 1990), cert. denied, 111 S. Ct. 2064 (1991). The determination whether an offense continued after a change in the Guidelines is for the sentencing judge, subject to review for clear error. See, *e.g.*, *United States* v. *Barsanti*, 943 F.2d 428, 436 (4th Cir. 1991), cert. denied, 112 S. Ct. 1474 (1992); *United States* v. *Underwood*, 932 F.2d 1049, 1053-1055 (2d Cir.), cert. denied, 112 S. Ct. 382 (1991). In this case, the district court correctly found that petitioner's offense continued into the post-amendment period.

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[2] The court of appeals vacated the sentence that petitioner challenges in the petition, and the district court has yet to resentence petitioner. For that reason, petitioner's challenge to his sentence is not based on a final judgment against him and is therefore premature. In any event, petitioner's claims lack merit, for the reasons given in the text.

Petitioner pleaded guilty to Count 1 of the indictment, which charged that "[c]ommencing at least as early as 1984, * * * and continuing until the return of this indictment [January 10, 1991]," petitioner and others conspired to commit bank fraud. C.A. App. A5. Petitioner introduced no evidence to suggest that he did anything to withdraw from the conspiracy, and absent some indication of withdrawal, the district court properly found that petitioner's involvement continued until 1991, consistent with the indictment and petitioner's guilty plea.

Petitioner argues, Pet. 16-17, that his plea was limited by his statement that he conspired to defraud Peoples Heritage "[d]uring the time period from 1984 through 1987." Pet. App. 29. Petitioner reads too much into that statement. It was contained in a petition to the district court to enter a guilty plea, see C.A. App. A48-A56, and it served only to satisfy the court that there was a factual basis for the plea. Fed. R. Crim. P. 11(f). Because the substantive counts to which petitioner pleaded guilty related to a specific sham credit transaction, his statement to the court included only the details of that transaction. See Pet. App. 30.

When he entered his guilty plea, petitioner was advised by the district court that the sentencing procedures would be consistent with the provisions of the Sentencing Guidelines; that the Guidelines imposed no limit on the information that the court could consider, as long as the information was reliable; and that the court would "consider all relevant conduct at the time of sentencing, even though you are pleading guilty to less than all counts in the Indictment." C.A. App. A85-A87. The district

court specifically found that petitioner's involvement with the conspiracy extended beyond the date of the Guidelines amendments, Pet. App. 32-33:

> While it is true that the defendants were forced to resign from Peoples Heritage in November 1988, the court finds that the defendants continued their participation and ownership in the joint ventures, corporations, partnerships and property which was obtained with money illegally defrauded from Peoples Heritage. Further, their participation in these ventures continued unimpeded until the issuance of the Indictment. Thus, while defendants may not have been employed by Peoples Heritage after November 1988, they had not extricated themselves from the joint ventures, partnerships and other entities which were set up to defraud Peoples Heritage and which continued into existence beyond the date of their forced resignation.

Based on that finding, the district court and the court of appeals properly concluded that the application of the amended Guidelines did not run afoul of the Ex Post Facto Clause.[3]

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[3] Contrary to petitioner's assertion, Pet. 18, the decision below does not conflict with *United States* v. *Bloom*, 945 F.2d 14 (2d Cir. 1991), or *United States* v. *Bakker*, 925 F.2d 728 (4th Cir. 1991). In *Bloom*, the court held that the defendant properly was not given a Guidelines sentence because he specifically disclaimed that his conduct encompassed acts occurring after the effective date of the Guidelines, and the court had no basis to conclude to the contrary. 945 F.2d at 17-18. In *Bakker*, the defendant went to trial, and there was no evidence that the conspiracy extended beyond the effective date of the Guidelines. 925 F.2d at 739. Here, by contrast, petitioner pleaded

2. Petitioner contends that the district court erred in accepting his guilty plea and in refusing to permit him to withdraw that plea. Pet. 19-21.

a. Petitioner's argument that the district court erred in accepting his guilty plea is based on the mistaken premise that the record shows that the conspiracy ended before the effective date of the amendments. See Pet. 21. As discussed above, however, the indictment to which petitioner pleaded guilty specifically charged that the conspiracy continued into 1991, petitioner offered no evidence of withdrawal from the conspiracy, and the district court found as a fact that petitioner's involvement with the conspiracy continued until he was indicted. The court of appeals properly concluded that the district court did not err in accepting petitioner's guilty plea. Pet. App. 12.

b. Petitioner also argues that the district court was required to allow him to withdraw his guilty plea. Pet. 19-20. Once a defendant enters a guilty plea, however, he has no right to withdraw it. *United States* v. *Hickok*, 907 F.2d 983, 985 (10th Cir. 1990). The district court "may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason," Fed. R. Crim. P. 32(d), a decision that rests in the sound discretion of the district court. See, *e.g.*, *United States* v. *O'Hara*, 960 F.2d 11, 13-14 (2d Cir. 1992); *United States* v. *Rhodes*, 913 F.2d 839, 845 (10th

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guilty to an indictment charging an ongoing conspiracy; he did not disclaim or attempt to disprove that the conspiracy continued past the effective date of the Guidelines amendments; and the district court specifically found that the conspiracy continued until petitioner was indicted.

Cir. 1990), cert. denied, 111 S. Ct. 1079 (1991). The defendant has the burden of proving the existence of a "fair and just reason." *United States* v. *Hickok*, 907 F.2d at 985.

The only reason offered by petitioner for withdrawing his plea was the district court's determination that petitioner was subject to the amended Guidelines. In the plea agreement, however, petitioner agreed that "[t]he sentencing guidelines shall apply to this case" and that "the sentencing judge alone will decide what sentence to impose." C.A. App. A59. Petitioner agreed "that even if he should later not be satisfied with his sentence, he shall have no right to withdraw his guilty plea after acceptance of his plea by the [district court]." *Ibid.* As the court of appeals noted, "[petitioner] entered a voluntary and knowing plea upon the advice of counsel and after careful and extensive questioning by the district [court] as to the nature and consequences of his plea." Pet. App. 13. Under these circumstances, the court properly held that the district court did not err in refusing to allow petitioner to withdraw his plea because he was dissatisfied with his sentence. *Ibid.*; see also *United States* v. *Lambey*, 974 F.2d 1389, 1393-1396 (4th Cir. 1992) (en banc).

3. Finally, petitioner contends that the court of appeals erred by not ordering the district judge to recuse himself from petitioner's resentencing. Pet. 22-24.

Petitioner's claim of bias is based on letters sent to the district court by RTC and FDIC. See Pet. App. 9-10 (summarizing letters). But RTC, which has assumed receivership of Peoples Heritage, and FDIC, which insures the accounts there, were victims of

petitioner's crimes. Pet. App. 45; *United States* v. *Burger*, 964 F.2d at 1071. A district court's receipt of letters from victims would not make it "appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation," *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847, 860 (1988), and thus does not create any need for recusal. See 28 U.S.C. 455(a).

Indeed, petitioner specifically agreed in the plea agreement that "the government may consult the appropriate federal regulatory agency regarding the nature and seriousness of his misconduct, and make known the impact of such misconduct upon the financial institution, the institution's depositors, others involved and the public at large." C.A. App. A60. In evaluating the district judge's refusal to recuse himself, it should make no difference that RTC and FDIC mailed their letters directly to the court, rather than to the United States Attorney for transmittal. That is particularly true where, as here, the district court merely passed the letters on to the probation office. See Pet. App. 46. In any event, the district judge stated that he did not consider the communications before imposing sentence. Pet. App. 49. Accordingly, the court of appeals properly declined to order the judge to recuse himself. See *United States* v. *Pollard*, 959 F.2d 1011, 1030-1031 (D.C. Cir.), cert. denied, 113 S. Ct. 322 (1992).[4]

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[4] Because the RTC and FDIC letters were not prohibited ex parte communications and were not considered by the district court, the decision below does not conflict with any of the cases cited by petitioner, see Pet. 24, which involved ex parte contacts between the prosecutor and trial judge. To the extent that petitioner's complaint rests on the fact that he was not

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1993

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notified of the letters before sentencing, the court of appeals' resentencing order fully addresses any fairness concerns. Cf. *Liljeberg*, 486 U.S. at 862.

(3)

92-828

No. 92-848

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

JAMES R. CRUCE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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14 pp

QUESTIONS PRESENTED

I.

IMPOSITION OF SENTENCE PURSUANT TO MORE PUNITIVE GUIDELINE AMENDMENTS ADOPTED AFTER THE DEFENDANT'S OFFENSES HAD BEEN COMMITTED VIOLATE THE EX POST FACTO CLAUSE.

II.

THE COURT ERRED IN ACCEPTING DEFENDANT'S CRUCE'S PLEA TO THE CONSPIRACY COUNT AND ERRED IN ITS REFUSAL TO PERMIT DEFENDANT CRUCE TO WITHDRAW HIS PLEA TO THAT COUNT AS A SUFFICIENT FACTUAL BASIS WAS NOT MADE TO SUPPORT THE PLEA AS CONSTRUED BY THE COURT IN VIOLATION OF RULE 11, F.R.Cr.P., AND THE DUE PROCESS CLAUSE.

III.

THE COURT ERRED IN FAILING TO SET ASIDE THE SENTENCE IMPOSED AND GRANT RECUSAL WHEN IT WAS DISCLOSED THAT THE SENTENCING COURT RECEIVED AND CONSIDERED PREJUDICIAL EX PARTE COMMUNICATIONS FROM THE F.D.I.C. AND R.T.C. PRIOR TO SENTENCE, AND THE REMAND FOR RESENTENCING ORDERED BY THE TENTH CIRCUIT COURT OF APPEALS SHOULD BE HEARD BY A DIFFERENT DISTRICT JUDGE.

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Petitioner submits the following reply brief concerning matters first raised in the Brief For The United States in Opposition.

STATEMENT

The remand by the Tenth Circuit for resentencing was extremely narrow. The Court of Appeals affirmed petitioner's conviction and the manner in which the sentencing guidelines were applied and computed but held that petitioner was . . . entitled to resentencing during the course of which he shall have the opportunity to " . . . comment upon [the letters in question] the probation officers determination and other matters relating to the appropriate sentence." Pet.App. 11.

Characterization of the ex-parte letters sent to the sentencing judge by the R.T.C. and F.D.I.C. prior to sentencing as " . . . discussing his case." Brief in Opposition, page 3, constitutes a substantial mischaracterization of the letters. See C.A.App. A322-338 for the full text of the letters. The letter written by Jack Smith Deputy General Counsel for the F.D.I.C. contained factual statements, arguments and conclusions relating to the offenses to which Cruce plead guilty, charges which were dismissed under the plea agreement and unindicted criminal acts. It contained numerous citations, statutory references, statements of legislative history, footnotes and was self-described on page 5 as a " . . . legal memorandum." It accused Cruce of assignation with prostitutes provided by a codefendant, Las Vegas money laundering, utilizing brown paper bags, unaccounted for millions in profits, lack of cooperation, refusal to comply with subpoenas and factual attributions to "sources." Both letters urged the court to impose a substantial prison sentence while the plea agreement entered into by the U.S. Attorney's Office and the petitioner provided " . . . that the Government will not advocate a specific sentence, fine or imprisonment." C.A.App. 60.

In footnote 1 of the Government's brief in opposition it is noted that codefendant Thomas Burger whose case was also remanded to the same district judge for resentencing by the

Tenth Circuit to permit him to comment upon similar ex-parte letters has been resentenced by that judge to the exactly the same sentence as was previously imposed prior to the appeal.

ARGUMENT

I.

IMPOSITION OF SENTENCE PURSUANT TO MORE PUNITIVE GUIDELINE AMENDMENTS ADOPTED AFTER THE DEFENDANT'S OFFENSES HAD BEEN COMMITTED VIOLATE THE EX POST FACTO CLAUSE.

The district court in making its finding that the petitioner's offense continued past the effective dates of the guideline amendments ignored the clear record made at the time of the plea of guilty. While the indictment alleged that the conspiracy continued to the return date [January 10, 1991] the only evidence that the district court had as a basis for its finding was the petitioner's plea of guilty which limited his participation in the conspiracy "during the time period from 1984 through 1987, . . . " C.A.App. A49.

During the in court plea proceeding the defendant was sworn and the district court examined the petitioner and stated referring to the Petition to Plead Guilty "this petition alleges that during the time period from 1984 through 1987, . . . " and the defendant acknowledge that he understood the court's statement and that he did those acts. C.A.App. A78-79. The court then requested that the prosecutor outline its evidence to prove the defendant guilty of the offense. The prosecutor made a detailed statement of facts concerning the offenses referring to activities in November 1987, December 1987, and July 1988. C.A.App. A80-84. The defendant acknowledged that he believed the Government had evidence against him that could prove him guilty of the four counts. C.A.App. A85. The substantive offenses alleged in the indictment were all alleged to have occurred between April 26, 1985, and November 21, 1988, and no date or action is referenced in the indictment subsequent to November 21, 1988. C.A.App. A1-47.

Thus, the defendant's plea and the factual statements of the prosecutor provided no evidence that petitioner's participation in the conspiracy alleged in the indictment continued past the effective dates of the amendments in 1989 and 1990 and the district court finding was totally inconsistent with petitioner's guilty plea and the factual statement of the prosecutor.

The statement in petitioner's Petition to Plead Guilty, his sworn answers to the court's questions and the prosecutor's factual statements related to both the substantive offenses and to the conspiracy charge and were limited to dates prior to the prejudicial amendments to the guidelines. It is axiomatic that a defendant may be guilty of conspiracy and plead guilty to conspiracy without admitting the totality of the acts alleged in the conspiracy count of the indictment. The district court thus had no evidence with which to make a finding that petitioner's conspiracy continued until 1991.

The substantive counts to which petitioner plead guilty were a part of the conspiracy and petitioner's statement clearly admitted to a conspiracy making specific reference to agreements with others to commit the offense. C.A.App. A49,78-79.

The finding of the district court quoted on page 7 of the Government's brief in opposition is not supported by the factual record made at the time of the plea or the Petition to Plead Guilty. The factual record on the plea only supports a finding of criminal activities which ended prior to the effective dates of the prejudicial amendments of the guidelines and thus imposition of sentence based upon the amendments to the guidelines clearly violates the ex post facto clause.

The decision of the Tenth Circuit in petitioner's case is in direct conflict with the Second Circuit decision in *United States v. Bloom*, 945 F.2d 14 (2nd Cir. 1991). As in *Bloom* petitioner here at his plea was explicit in stating the dates of his involvement in the conspiracy offense. This was made clear to the district court on two occasions, that is, the factual statement contained in the Petition to Plead Guilty and petitioner's sworn answers to the courts questions at the Rule 11

hearing. The Government's factual statement at the plea hearing also did not claim that defendant committed acts past the effective dates of the guideline amendments. The record in petitioner's case is fully as clear as that in *Bloom* where the defendant specified that his conduct occurred prior to the effective date of the guidelines. In *Bloom* the court held that the guidelines did not apply. Below, the Tenth Circuit, in conflict with *Bloom*, held that the prejudicial guideline amendments should be applied to petitioner. The court in *Bloom* also pointed out that the court in making its factual decisions concerning application of the guideline or application of guideline amendments must rely on the facts in the plea record and not on the dates stated in the indictment. The court specifically held that the ending date of indictment did not govern the decision. The court in *Bloom* stated:

> "Based on the foregoing, we conclude that a district court has the authority to determine whether a defendant's participation in the charged offense continued through the dates alleged in the indictment. Here, Bloom essentially negotiated a change in the plea agreement during the allocution by stating that he was only pleading guilty to conduct occurring prior to November 1, 1987. See Gov't Supp.App. at 5 ("[T]he U.S. Attorney's Office agreed not to charge David with committing any crimes after November 1, 1987."); see also *United States v. Edgecomb*, 910 F.2d 1309, 1312 (6th Cir. 1990) ("If [defendant] disagreed with the dates of the conspiracy, he should have attempted to negotiate a change in the plea agreement."). At the allocution, no specific evidence was presented which indicated that Bloom continued to commit the charged conduct beyond November 1, 1987. Since Bloom's plea allocution was deliberately limited to pre-Guidelines conduct and the government failed to introduce evidence of post-Guidelines conduct, the district court did not err in finding by a preponderance of the evidence that the defendant's illegal conduct occurred pre-Guidelines. Moreover,

> because Bloom specifically disclaimed that his conduct encompassed acts occurring after November 1, 1987, he may not now argue that he presented proof of such conduct to Judge Edelstein. See *United States v. Sloman*, 909 F.2d 176, 182 (6th Cir. 1990) (counsel who stated that his client's conduct extended past November 1, 1987 and agreed that his client should be sentenced under the Guidelines has waived his objection to the judge's proposed course of conduct.)."

Bloom apparently thought he would receive a shorter sentence if the guidelines were not applied. He specified the dates in his plea and the Government did not object and the court accepted the plea as stated. Here the same thing happened but the district court then ignored the limited nature of the plea which the Government had approved and it had previously accepted and imposed a sentence based upon the later effective and prejudicial guidelines. The decision below by the Tenth Circuit is clearly in conflict with *Bloom*.

The Tenth Circuit decision also conflicts with *United States v. Bakker*, 925 F.2d 728 (4th Cir. 1991).

The court in *Bakker* specifically held that the alleged ending date in the indictment does not govern the court's decision concerning applicability of guidelines or amendments. The Fourth Circuit correctly observed that relying upon the ending date alleged in the indictment would permit the Government to manipulate applications of the guidelines or guideline amendments.

The Tenth Circuit in its decision placed binding reliance upon the boiler plate allegation of the indictment "commencing at least as early as 1984, the exact date being unknown to the grand jury, and continuing until the return of this indictment, . . . " C.A.App. A5. The *Bakker* court required that the district court make its factual decision based upon the record and not the formal indictment allegations. As noted the only record compiled at the plea hearing were the admissions of the defendant and statement of fact by the Government which clearly showed only violations predating the effective date of the prejudicial amendments. Thus, the Tenth Circuit decision

below clearly conflicts with the Fourth Circuit's decision in *Bakker.* The decision also conflicts with this court's decision in *Miller v. Florida,* 107 S.Ct. 2446 (1987), 482 U.S. 423, 96 L.Ed.2d 351.

II.

THE COURT ERRED IN ACCEPTING DEFENDANT CRUCE'S PLEA TO THE CONSPIRACY COUNT AND ERRED IN ITS REFUSAL TO PERMIT DEFENDANT CRUCE TO WITHDRAW HIS PLEA TO THAT COUNT AS A SUFFICIENT FACTUAL BASIS WAS NOT MADE TO SUPPORT THE PLEA AS CONSTRUED BY THE COURT IN VIOLATION OF RULE 11, F.R.Cr.P, AND DUE PROCESS CLAUSE.

The Government's argument that the record shows that the conspiracy continued into 1991 is in error. The only record made at the time of the plea by the defendant in his answers to the district court's questions and by Government counsel in his factual statement of evidence that could be adduced only show that the conspiracy continued into November of 1988. Only the boiler plate allegation of the indictment alleging that the conspiracy "continuing until the return of this indictment, . . . " C.A.App. A5 suggests otherwise. The indictment of course is no proof or evidence of the matters alleged. Thus the only record made at the plea was that the defendant's involvement and the conspiracy ended in November of 1988.

If the district court construed the plea and found that the defendant's involvement in the conspiracy ended in November of 1988 then the record supported the plea and factual basis established pursuant to Rule 11.

If the district court was to construe the plea as being to a conspiracy continuing into 1991, then the factual basis was insufficient to support such a finding and the district court erred in accepting the plea. The requirements of Rule 11 for a factual basis do not permit the court to accept a plea such as petitioners which was very specific concerning his dates of involvement and thereafter construe the plea to extend the

defendant's involvement past the date which he admitted to and thereafter apply subsequently amended guidelines which quadrupled his sentence. The factual basis established at the plea therefore does not support the sentence imposed and reliance on guidelines amended after the dates specified by the defendant and accepted by the court.

If the court intended to construe defendant's plea as an admission to a conspiracy continuing into 1991 when in fact the plea entered by the petitioner only admitted to a conspiracy extending through 1987, then the district court was required to permit him to withdraw it and was not entitled to construe the plea as admitting to a conspiracy which extended beyond the date that the petitioner admitted.

The Government in footnote 3 on page 8 of its brief suggests that the petitioner did not disclaim an ongoing conspiracy. The petitioner twice during the plea proceeding specifically stated that he was involved from 1984 through 1987 and thereby denied that his offense continued past the effective dates of the guidelines amendments.

It should be noted that petitioner's motion to withdraw his plea was filed prior to imposition of sentence. Petitioner's counsel acted promptly prior to imposition of sentence when it was first determined that the probation office through the draft presentence report was contending that the prejudicial guideline amendments applied.

The decisions in *United States v. O'Hara*, 960 F.2d 11 (2nd Cir.1992) and *United States v. Rhodes*, 913 F.2d 839 (10th Cir.1990), cert denied, 111 S.Ct. 1079, have no application at bar. In *O'Hara*, the defendant had a "change of heart" and wanted a jury to decide his guilt. Here the defendant learned that the district court intended to construe his plea in a manner which was inconsistent with the factual record made at the plea hearing. Petitioner promptly made his motion to withdraw the plea at the first opportunity when he learned by way of the draft presentence report that the court intended to impose a sentence based on the amended guidelines. In *Rhodes*, the defendant had failed to disclose previous convictions to his counsel when counsel attempted to calculate a probable sentence under the guidelines. The undisclosed prior

convictions thus increased Rhodes criminal history category thereby increasing his guideline range. Petitioner made his position clear at the plea hearing specifying his dates of his involvement in the conspiracy offense. Finally, in *United States v. Lambey*, 974 F.2d 1389 (4th Cir. 1992), the defendant claimed to have relied upon an incorrect guideline estimate by his counsel. This decision has no application at bar.

Since the district court intended to construe petitioner's plea as an admission that his conspiracy offense continued into 1991 when his admissions only extended through 1987, the district court was bound to permit him the opportunity to withdraw the plea and thus not trap him by accepting a plea based on one set of facts and applying a different set of facts to calculate the sentence under the guidelines.

The petitioner thus plead guilty knowing the guidelines would apply but specifying that his conduct only continued through 1987. The district court then trapped him and imposed a sentence under subsequently amended guidelines which quadrupled his term. The provisions of Rule 11 and 32 must be enforced and the decision below reversed.

III.

THE COURT ERRED IN FAILING TO SET ASIDE THE SENTENCE IMPOSED AND GRANT RECUSAL WHEN IT WAS DISCLOSED THAT THE SENTENCING COURT RECEIVED AND CONSIDERED PREJUDICIAL EX PARTE COMMUNICATIONS FROM THE F.D.I.C. AND R.T.C. PRIOR TO SENTENCE, AND THE REMAND FOR RESENTENCING ORDERED BY THE TENTH CIRCUIT COURT OF APPEALS SHOULD BE HEARD BY A DIFFERENT DISTRICT JUDGE.

A characterization of the prejudicial ex parte letters from the R.T.C. and F.D.I.C. to the district court as statements of the " . . . victims of petitioner's crimes." fractures credulity. The F.D.I.C. and R.T.C. are only victims by reason of their appointment as receiver for the failed institutions. They are obviously highly experienced financial regulatory agencies

with sophisticated legal staff both in house and outside counsel. A review of the R.T.C. letter will show that it is an aggressive meticulously prepared sentencing memorandum authored by four lawyers and signed by the Deputy General Counsel of the F.D.I.C. C.A.App. A322-336. The 1-page letter signed by former F.D.I.C. Chairman L. William Siedman references the 15-page R.T.C. letter and invokes the imperator of his office as Chairman of the F.D.I.C. to influence the district court and urge imposition of a substantial term of imprisonment.

The Government in its brief argues that it would make no difference that the R.T.C. and F.D.I.C. mailed their letters to the court rather than to the U.S. Attorney. The U.S. Attorney's Office however could not send such letters to the court or the probation office as it agreed in the plea agreement " . . . that the Government will not advocate a specific sentence, fine or imprisonment." C.A.App. A60, thus the U.S. Attorney's Office could not send the letters. Even so the U.S. Attorney's Office would not write the court without copying the defendant's counsel.

While the defendant was aware that the Government would consult with appropriate federal regulatory agencies regarding his offense he had the right to expect that the information received and provided to the district court would be made known to him prior to sentencing in order to permit appropriate objections and showing pursuant to Rule 32(c)(3)(d).

This court's decision in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), supports the requirement of recusal of the district judge. This court held that scienter or knowledge was not an element of a recusal pursuant to § 455(a) Title 28 United States Code. The district court is required to recuse itself if its impartiality can be reasonably questioned and it must avoid the appearance of partiality. Here the district court's receipt and consideration of the letters coupled with its failure to advise the petitioner and his counsel illustrates partiality and requires recusal. The press release by the F.D.I.C. to R.T.C. confirm the appearance of impropriety.

The Government in its brief cites the statement of the district court that it did not consider the letters in imposing sentence. That statement is belied by the fact that the Tenth Circuit Court of Appeals remanded the matter to the district court for resentencing to permit the defendant to commit upon the letters. The statement of the district court is also belied by the fact that the district court imposed the exact amount of restitution suggested by the ex parte letter and used the same statutory language in imposing the restitution order, see C.A.App. A115, 334. See Petition for Writ of Certiorari No. 92-7196, pages 6-11 of codefendant Burger for a full discussion of the striking similarities between the proposals of the ex parte letters and the sentence imposed.

The freedom of the judiciary from improper communication by government agencies is at stake.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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